STATE OF MICHIGAN

IN THE SUPREME COURT

RUBEN CASTRO and CHRISTY CASTRO, jointly and severally, Plaintiffs-Appellees, v. JAMES ALAN GOULET, M.D., and JAMES ALAN GOULET, M.D. P.C., jointly and severally, Defendants-Appellants.	Supreme Court Case No. 152383 Court of Appeals Case No. 316639 Washtenaw County Circuit Court Case No. 13-138-NH Honorable David S. Swartz

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DEFENDANTS-APPELLANTS JAMES ALAN GOULET, M.D. AND JAMES ALAN GOULET, M.D., P.C.'S
APPLICATION FOR LEAVE TO APPEAL (CORRECTED)

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

In this case, Plaintiff-Appellee Ruben Castro filed a medical malpractice complaint without an affidavit of merit five days before the statute of limitations expired. A motion to extend the time for filing the affidavit of merit was filed with the complaint. Sixteen days after the statute of limitations expired and while the motion to extend remained pending, Mr. Castro filed an affidavit of merit signed by an expert who had first been contacted four to five months earlier. An order allowing the extension was issued nearly a month after the statute of limitations expired and in response to that order, Mr. Castro filed the affidavit of merit with an amended complaint.

The significant jurisprudential questions raised by the *published* majority and dissenting opinions in *Castro v Goulet* are as follows:

1. Whether, in light of this Court's precedent and the prior published authority of the Michigan Court of Appeals, the *Castro* majority erred in concluding that Mr. Castro's filing of a motion to extend with his medical malpractice complaint pursuant to MCL 600.2912d(2) permitted him to file an affidavit of merit *after the statute of limitations expired* and thereby retroactively "perfect" the complaint which, without the requisite affidavit of merit, did not properly commence the action and toll the limitations period?

Defendants-Appellants say "yes."
Plaintiffs-Appellees say "no."
The Trial Court said "yes."
The Court of Appeals majority said "no."

2. Whether the *Castro* majority erred in defining "good cause" in the context of MCL 600.2912d(2) to mean that the Trial Court was to exercise its "best judgment and discretion" in determining whether conditions exist to excuse delay, rather than requiring the Court to find a "legally sufficient" or "substantial" reason for the delay?

Defendants-Appellants say "yes."
Plaintiffs-Appellees would say "no."
The Trial Court did not address this question.
The Court of Appeals majority said "no."

3. Whether - given the undisputed facts of this case - the *Castro* majority's finding of good cause eviscerates the good cause requirement of MCL 600.2912d(2)?

Defendants-Appellants say "yes."
Plaintiffs-Appellees would say "no."
The Trial Court would say "no."
The Court of Appeals majority would say "no."

STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT

Defendants-Appellants James Alan Goulet, M.D., and James Alan Goulet, M.D., P.C. seek leave to appeal from an August 20, 2015 non-unanimous, published opinion of the Michigan Court of Appeals (*Castro v Goulet*, Docket No. 316639, Exhibit A) reversing the Trial Court's order granting summary disposition in their favor on statute of limitations grounds (Order Granting Summary Disposition, Exhibit B). Respectfully, the *Castro* majority opinion is an aberrant departure from settled law and will create conflict, confusion, and uncertainty in the jurisprudence of this State.

Mr. Castro's medical malpractice complaint was initially filed without an affidavit of merit but with a motion to extend for 28 days the time for filing the affidavit, pursuant to MCL 600.2912d(2). The *Castro* majority erroneously held that the complaint was "perfected" when the affidavit of merit was "filed" within the 28-day extension period, even though the hearing on the motion was held, the order granting the extension was entered, and the affidavit of merit was filed, after the statute of limitations expired. *Castro v Goulet, slip op.*, at 5.

Dr. Goulet also challenges the meaning and application *Castro* gives to the statute's "good cause" requirement. Before a 28-day extension can be granted, MCL 600.2912d(2) requires that good cause be shown. The *Castro* majority erroneously held that this required nothing more than the exercise of the trial court's "best judgment and discretion." The majority further erred in concluding that reassurances Mr. Castro had been given that his symptoms would subside provided good cause for the delay in filing an affidavit of merit.

Dr. Goulet relies upon the grounds described in MCR 7.305(B)(3) and MCR 7.305(5) in seeking leave to appeal. First, the *Castro* majority decision conflicts with the rule of law established by this Court in *Scarsella v Pollak*, 461 Mich 547, 549-50; 607 NW2d 711 (2000),

and with two published Court of Appeals decisions directly on point, *Young v Sellers*, 254 Mich App 447, 449; 657 NW2d 555 (2002), and *Barlett v North Ottawa Cmty Hosp*, 244 Mich App 685; 625 NW2d 470 (2001). Second, the interpretation given to the statute by the *Castro* majority ignores its plain language and reads words into the statute that simply do not exist, disregarding the strict construction this Court has consistently given to the affidavit of merit statute and other integrated components of Michigan's tort reform provisions in the nearly three decades since their enactment. Third, the meaning given to the statute's "good cause" requirement is tantamount to no standard at all, conflicts with the definition of good cause in other modern contexts, and undermines the Legislature's intent to condition the grant of an extension upon a definable legal standard. The majority's application of the good cause standard is equally troubling and establishes a new rule that equates reassurance of recovery with justification for disregarding the impending statute of limitations.

For each of these reasons, which are more fully explained below, the *Castro* majority decision is clearly erroneous and will cause material injustice by depriving Dr. Goulet of the substantive legal defenses that would otherwise bar his claim. Further, the issues raised in this Application involve principles of major significance to the state's jurisprudence, as has been demonstrated by this Court's consistent willingness to address similar issues and to vigilantly enforce adherence to the legislative will.

Dr. Goulet respectfully requests that this Court grant his application for leave to appeal and peremptorily reverse, or reverse after hearing, the opinion of the Court of Appeals and reinstate the Trial Court order granting summary disposition in his favor.

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In January 2004, Plaintiff-Appellee Ruben Castro sustained multiple injuries when he was hit by a car while riding a bicycle. Surgery was performed to repair a fractured pelvis, but in the years to follow, Mr. Castro continued to complain of left hip pain. On November 9, 2010, Mr. Castro sought treatment from Defendant-Appellant James Goulet, M.D., an orthopedic surgeon. Dr. Goulet recommended an arthroscopic procedure. Mr. Castro consented to the procedure by signing a written consent form which specified that the risks of the procedure include nerve injury.

The arthroscopic procedure was performed on February 9, 2011 and successfully alleviated Mr. Castro's pain. But immediately thereafter, Mr. Castro complained of numbness in his penis. Plaintiffs served a Notice of Intent to Sue ("NOI") on August 25, 2011, 6½ months after the surgery, alleging that Dr. Goulet breached the standard of care by failing to warn that nerve damage to Mr. Castro's penis and erectile dysfunction were a risk of surgery. *See* NOI (Exhibit D). Mr. Castro did not commence the action when the 182-day notice period ended. Rather, the Complaint was not filed until February 4, 2013, five days before the statute of limitations expired. *See* Complaint (Exhibit E). Further, Mr. Castro did not file the required Affidavit of Merit ("AOM") with the Complaint but instead filed a motion to extend the time for filing an AOM. *See* Motion to Extend (Exhibit F). The motion was accompanied by a notice establishing a February 20, 2013 hearing date (*Id*.).

On February 25, 2013, Mr. Castro filed an AOM signed by Dr. Ryan Nunley. *See* AOM and Certificate of Service (Exhibit G). The hearing on the motion to extend was held on February 27. *See* 2/27/13 Transcript of Hearing (Exhibit H). Dr. Goulet's counsel argued that the "good cause" required for the requested extension was lacking because the purported reason for the extension was demonstrably wrong. Mr. Castro had asserted that Dr. Nunley, having just

been contacted by Mr. Castro's counsel on January 18 following a January 16 referral from an expert referral service, could not get an AOM out within the allotted time. But contrary to those asserted facts, Dr. Goulet's counsel expressed that he was in Dr. Nunley's office on January 16 for a deposition in another case. During the deposition, Dr. Goulet's counsel asked Dr. Nunley whether he had ever been consulted by a lawyer in Michigan about a different case. Dr. Nunley responded that Jim Wines (Mr. Castro's lawyer) had called him the previous week, but he had also been contacted about the case four or five months earlier by someone else (not Mr. Wines). *See* 2/27/13 Tr. at 5-6; Dr. Goulet's Response to Motion to Extend (Exhibit I). Despite these earlier contacts and other undisputed facts, the Trial Court granted the motion and an Order Granting Plaintiffs' Motion to Extend Time for Filing Affidavit of Merit 28 Days was entered on March 8. *See* 3/8/13 Order (Exhibit C). On that same day (March 8, 2013), Mr. Castro filed a First Amended Complaint attaching the AOM. *See* Amended Complaint (Exhibit J).

Dr. Goulet then moved for summary disposition, arguing that the filing of the complaint on February 4 with the motion to extend did not toll the statute of limitations and because the AOM was not filed until after the statute of limitations expired, the action was time-barred. In response, Mr. Castro took the position that because the motion to extend was filed with the Complaint and the hearing occurred within the 28-day extension period contemplated by MCL 600.2912d(2), the claim was preserved. Mr. Castro also argued that judicial tolling should be applied to prevent unfairness and to serve the ends of justice.

The Trial Court rejected Mr. Castro's arguments and granted summary disposition for Dr. Goulet, explaining that recent published case law "establishes that when a medical malpractice complaint is filed without an Affidavit of Merit it fails to toll the limitations period, and when the untolled period of limitations expires before the plaintiff files a complaint

accompanied by an Affidavit of Merit, the case must be … dismissed with prejudice on statute of limitations grounds." May 8, 2013 Hearing Tr. (Exhibit K) at 9. The Trial Court further explained that although MCL 600.2912d(2) "provides an additional 28 days to file an Affidavit of Merit for good cause, the mere filing of a motion to extend the time for filing an Affidavit of Merit is insufficient to toll the statute of limitations" and "[i]t is the granting of a motion to extend … that tolls the period of limitations …" *Id.* at 10. The Court therefore concluded:

> It is undisputed that the order granting plaintiffs' motion for 28 day extension of time was not signed until March eighth, 2013, well beyond the expiration of the period of limitations on February nine, 2013.
>
> Because the order granting an extension of time was not entered until after the … expiration of the statute of limitations, the Court's actual grant of an extension of time did not occur until after the expiration of the statute of limitations and the order signed on March eight, 2013, did not toll the period of limitations …

Id. at 11. The Court likewise rejected Mr. Castro's request to apply MCL 600.2301, which authorizes a court to disregard errors or defects in proceedings that do not affect a party's substantial rights:

> Since the filing of a timely Affidavit of Merit affects defendant's substantial rights, the Court cannot disregard the defect or error. The Court agrees with defendants that given section 2301 the Court cannot apply judicial tolling.

Id.

Mr. Castro appealed the grant of summary disposition to the Michigan Court of Appeals. On August 20, 2015, a *divided* Court of Appeals panel issued a *published* opinion reversing the grant of summary disposition and remanding for further proceedings. Defendants-Appellants now seek leave to appeal.

ARGUMENT

I. Given the Precedent Established by the Decisions of This Court and by the Prior Published Decisions of the Michigan Court of Appeals, the *Castro* Majority Blatantly Erred in Holding that Mr. Castro's Filing of a Motion to Extend With the Complaint Pursuant to MCL 600.2912d(2) Permitted Him to File an Affidavit of Merit After the Statute of Limitations Expired and Thereby Retroactively "Perfect" His Time-Barred Complaint.

The statute of limitations issue which has prompted this appeal derives from the statutory requirement that an affidavit of merit signed by a properly qualified expert accompany the filing of a medical malpractice complaint. MCL 600.2912d(1) states in pertinent part:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169…

The affidavit of merit must certify that the affiant has reviewed the medical records and must further describe the applicable standard of care, the affiant's opinion that the standard of care has been breached, the acts that should have been taken or omitted to avoid the breach, and the manner in which the breach proximately caused the alleged harm. *Id*.

Most pertinent to the issue raised on appeal, MCL 600.2912d(2) provides a mechanism for extending the time for filing the AOM. It states:

> (2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

In this case, when Mr. Castro filed his complaint on February 4, 2013, five days before the statute of limitations expired, he did not file the required affidavit of merit. The Complaint was instead accompanied by a motion to extend the time for filing the AOM and a notice of hearing scheduling the motion for February 20, 2013. By the time the AOM was filed on February 25, the motion was heard on February 27, and the order granting the motion was

entered on March 8, the statute of limitations had long since expired. Under such circumstances the case law is very clear: the statute of limitations bars the complaint and summary disposition *with prejudice* is required.

A. Supreme Court Review is Imperative Because *Castro* Creates a Conflict in the Law As to the Effect of Filing an Affidavit of Merit After the Statute of Limitations Has Expired, Implicates Legal Principles of Major Significance to the State's Jurisprudence, Is Clearly Erroneous, and Will Cause Material Injustice.

The interpretation and application of MCL 600.2912d(2) in *Castro* warrants the urgent intervention of this Court. *Castro* creates a schism in the law regarding the effect of filing an affidavit of merit after the statute of limitations has expired, invoking the grounds for review set forth in MCR 7.305(B)(5)(b). *Castro* proffers MCL 600.2912d(2) as the ostensible basis for departing from *Scarsella*. However, two published Court of Appeals decisions have previously ruled that MCL 600.2912d(2) does not avoid the *Scarsella* rule. *Castro* was not empowered to disregard that authority. The common law cannot exist without adherence to published precedent. If courts are free to ignore with impunity this canon of Michigan jurisprudence, the certainty and predictability that exists when the rule of law is respected will be replaced by confusion and chaos.

Further the proper application of MCL 600.2912d(2) in the statute of limitations context involves legal principles of major significance to the state's jurisprudence, warranting review under MCR 7.305(B)(3). MCL 600.2912d is an integral component of Michigan's tort reform statutes. This Court has repeatedly intervened to effectuate the legislative intent when aberrant lower court decisions have undermined its purpose. The same principles must be safeguarded here. *Castro* supplements the plain language of the statute with words of its own choosing in unabashed disregard of the legislative purpose.

Additionally, *Castro* is clearly erroneous and will cause material injustice by depriving Dr. Goulet of the substantive defenses he is entitled to assert under MCL 600.2912d(1), as applied by *Scarsella* and its progeny. Thus, grounds to appeal also exist under MCR 7.305(B)(5)(a).

B. The Standard of Review is De Novo.

This Court reviews the grant or denial of a motion for summary disposition de novo. *Hill v Sears Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012); *Rory v Cont'l Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). De novo review is also afforded to questions of statutory interpretation. *Mich Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008). In *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011), this Court explained, "Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text. If the text is unambiguous, we apply the language as written without construction or interpretation (footnotes omitted)." Further, the Court may not read words into a statute that do not exist. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

C. The Published Authority of This Court and the Court of Appeals Establishes That a Complaint Filed Without the Required Affidavit of Merit Does Not Toll the Statute of Limitations, and If the Affidavit of Merit is Filed After the Limitations Period Expires, Dismissal With Prejudice is Required.

The statute of limitations applicable to a claim for medical malpractice is two years from the date of the act or omission giving rise to the claim. *See* MCL 600.5805(6), MCL 600.5838a(1). Mr. Castro's claim stems from the arthroscopic procedure that was performed on February 9, 2011. Thus, the limitations period expired on February 9, 2013.[1]

[1] A notice of intent to file a malpractice claim, which must be filed at least 182 days before an action is commenced, may toll the statute of limitations if the claim would be time-barred during the 182-day notice period. MCL 600.2912b(1). However, a NOI served more than 182 days before the expiration of the statute of limitations does not initiate tolling. *See e.g., Hoffman v*

(footnote continued . . .)

Typically, the filing of a complaint will toll the statute of limitations. *See* MCL 600.5856(a). However, if the complaint asserts a claim for medical malpractice, it must be accompanied by an affidavit of merit. *See* MCL 600.2912d(1). The failure to file an affidavit of merit with a complaint for medical malpractice renders the complaint a "nullity" and the fact of its filing does not toll the statute of limitations. *Scarsella v Pollak*, 461 Mich 547, 549-50; 607 NW2d 711 (2000) ("because the complaint without an affidavit was insufficient to commence plaintiff's malpractice action, it did not toll the period of limitation."). This interpretation is necessary, this Court explained, to effectuate "the Legislature's clear statement that an affidavit of merit 'shall' be filed with the complaint." *Id*. at 552. As a result, if an affidavit of merit is not filed before the statute of limitations expires the case must be dismissed with prejudice. *Id*. at 549.

This Court reaffirmed the *Scarsella* rule in *Ligons v Crittenton Hosp*, 490 Mich 61; 803 NW2d 271 (2011). In *Ligons*, this Court was asked to decide whether the dismissal of a medical malpractice suit was required if a defective affidavit of merit was filed after expiration of the limitations period and the wrongful death savings period. In holding that dismissal with

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Boonsiri, 290 Mich App 34, 49; 801 NW2d 385 (2010) ("the first NOI did not trigger tolling under MCL 600.5856(c) because it was filed more than 182 days before the limitations period would have expired."). In the present case, Mr. Castro served his NOI on August 25, 2011, which is more than 182 days before the statute of limitations expired on February 9, 2013. Accordingly, the NOI did not toll the statute of limitations applicable to his claim. *See* MCL 600.2912b(1) ("Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced…"); MCL 600.5856(c) ("The statutes of limitations or repose are tolled…[a]t the time notice is given in compliance with the applicable notice period under section 2912b, if ***during that period*** a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.") (emphasis added).

prejudice was required, this Court explained that "allowing amendment of the deficient AOM would directly conflict with the statutory scheme governing medical malpractice actions, the clear language of the court rules, and precedent of this Court." *Id*. at 65. This Court reiterated that *Scarsella* establishes that when a plaintiff omits to file the required AOM, the complaint is ineffective and "does not work a tolling of the applicable period of limitation." *Id.* at 73. Further, "[w]hen the untolled period of limitations expires before the plaintiff files a complaint accompanied by an AOM, the case must be dismissed with prejudice on statute-of-limitations grounds." *Id*. at 73.

This Court most recently reiterated this rule in *Tyra v Organ Procurement Agency of Mich*, __ Mich __ ; __ NW2d __ (2015), which involved two Court of Appeals opinions addressing the statute of limitations effect of prematurely-filed complaints. See *Tyra v Organ Procurement Agency*, 302 Mich App 208; 840 NW2d 730 (2013), and *Furr v McLeod*, 304 Mich App 677; 842 NW2d 465 (2014). In *Tyra*, plaintiff alleged that defendants were negligent in failing to determine that a transplanted kidney was not a proper match. The complaint was filed on August 13, 2009, before the 182-day notice period expired. On January 13, 2010, defendant moved for summary disposition, arguing that because the complaint had been filed prematurely, it did not toll the statute of limitations and given that the limitations period had since expired, the error could not be cured by refiling. The trial court agreed and granted the motion. A divided Court of Appeals reversed, concluding that under *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009), the Court of Appeals should have considered the possibility of allowing plaintiff to amend her complaint under the authority of MCL 600.2301. Judge Wilder dissented, opining that *Zwiers* had been undermined by this Court's decision in *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011).

The complaint was also filed before the 182-day notice period expired in *Furr*. Defendants moved for summary disposition, arguing that because the complaint was filed prematurely, the limitations period was not tolled and had since expired. The trial court denied the motion, citing *Zwiers* for the proposition that MCL 600.2301 allowed a trial court to ignore noncompliance with the NOI statute when the defendant's substantial rights were not prejudiced. On appeal, the divided Court of Appeals panel affirmed. A conflict resolution panel was ultimately convened. That non-unanimous panel affirmed the trial court, the majority having been unprepared to hold that *Driver* overruled *Zwiers* by implication.

On further appeal, this Court held that *Zwiers* was overruled by *Driver*. This Court also rejected the notion that MCL 600.1901, which states that a civil action is commenced by filing a complaint with the court, controlled the result. To the contrary, this Court reiterated that a medical malpractice action is not properly commenced unless the notice and affidavit of merit requirements are satisfied before the statute of limitations expires. This Court explained:

> Although a civil action is generally commenced by filing a complaint, a medical malpractice action can only be commenced by filing a timely NOI and then filing a complaint and an affidavit of merit after the applicable notice period has expired, ***but before the period of limitations has expired***. Because plaintiffs did not wait until the applicable notice period expired before they filed their complaints and affidavits of merit, they did not commence actions against defendants. Because the statute of limitations has since expired, plaintiffs' complaints must be dismissed with prejudice.

__ Mich at __ (emphasis added).

The published authority of the Michigan Court of Appeals has followed the rule laid down in *Scarsella*. *See Mouradian v Goldberg*, 256 Mich App 566, 571; 664 NW2d 805 (2003) (summary disposition was properly granted because the limitations period expired before the affidavit of merit was filed); *Holmes v Mich Capital Medical Ctr*, 242 Mich App 703, 709; 620 NW2d 319 (2000) ("Plaintiffs' claim was time-barred because plaintiffs' April 20, 1998, attempt

to remedy their failure to file the affidavit of merit occurred beyond the limitation period"). The *Castro* majority was not empowered to disregard this precedent.[2]

D. Published Authority Establishes That a Motion to Extend the Time for Filing the Required Affidavit of Merit Does Not Toll the Statute of Limitations.

Although the motion to extend allowed by MCL 600.2912d(2) was not at issue in *Scarsella* or *Tyra*, it was the central issue in *Barlett v North Ottawa Cmty Hosp* and *Young v Sellers*, which – relying upon the *Scarsella* rule - reached the same result. In failing to follow this precedent, the *Castro* majority violated the direction of MCR 7.215, which requires Court of Appeals panels to follow the rule of law established by prior Court of Appeals' decisions issued on or after November 1, 1990 that have not been reversed or modified by this Court.

Contrary to *Barlett* and *Young*, the *Castro* majority erroneously held that because Mr. Castro filed a motion to extend with the Complaint and filed the affidavit of merit within 28 days thereafter, his Complaint was "perfected" pursuant to MCL 600.2912d(2). This conclusion cannot be reconciled with *Barlett* or *Young*. These cases have held that while a medical malpractice plaintiff may move to extend the time for filing the required affidavit of merit under MCL 600.2912d(2), the statute of limitations is not tolled upon the filing of such a motion; further, where the affidavit of merit is not filed before the statute of limitations expires, dismissal is required. See e.g., *Young v Sellers*, 254 Mich App at 449; *Barlett v North Ottawa Cmty Hosp*, 244 Mich App at 693-694. [3]

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[2] The *Castro* majority rejected *Tyra* as inapplicable because the 28-day extension was neither before the Court in *Tyra* nor mentioned by the Court. *Castro*, slip op. at 2 n2.

[3] Mr. Castro had argued that because MCL 600.2912d(1) is subject to MCL 600.2912d(2), tolling begins when a motion to extend is filed.

In *Young*, defendants argued that the Trial Court erred in permitting plaintiff to file an affidavit of merit after the period of limitations expired. The Court of Appeals concluded that "[a]lthough the Legislature provides an additional twenty-eight days to file an affidavit of merit for good cause, MCL 600.2912d(2), the mere filing of such a motion does not act to toll the period of limitation." 254 Mich App at 451. The Court explained:

> The existing case law construing the statutory authority governing medical malpractice actions states that the failure to timely file a complaint *and* an affidavit of merit will not toll the applicable limitation period. *Scarsella v Pollak*, 461 Mich. 547, 550; 607 N.W.2d 711 (2000); adopting *Scarsella v Pollak*, 232 Mich. App. 61; 591 N.W.2d 257 (1998); *Holmes v Michigan Capital Med Ctr*, 242 Mich. App. 703, 706-707; 620 N.W.2d 319 (2000). To commence a medical malpractice action, a plaintiff must file both a complaint and an affidavit of merit. *Scarsella*, *supra* at 549. According to *Scarsella*, *supra* at 550, allowing a party to amend a complaint by appending the untimely affidavit of merit would merely act to circumvent the requirement of MCL 600.2912d(1) that a party file the complaint and the affidavit to commence the action. In *Holmes*, *supra* at 708, this Court reversed a trial court's decision permitting the late filing of an affidavit of merit for good cause. Thus, a plaintiff in a medical malpractice action who neglects to file both an affidavit of merit and a complaint within the period of limitation, regardless of the reason, is barred from proceeding with the claim. *Scarsella*, *supra*; *Holmes*, *supra*. Although the Legislature provides an additional twenty-eight days to file an affidavit of merit for good cause, MCL 600.2912d(2), the mere filing of such a motion does not act to toll the period of limitation. *Barlett v North Ottawa Community Hosp*, 244 Mich. App. 685, 693-694; 625 N.W.2d 470 (2001).

Id. at 450-451.

Likewise in *Barlett*, the Court was asked to decide whether the filing of a motion to extend the time for filing an affidavit of merit with the complaint is sufficient to toll the limitations period. *Id*. at 691. The Court resoundingly rejected that notion, stating:

> Here, plaintiff filed a motion for extension of time to file the affidavit of merit, but did not notice the motion for hearing. Plaintiff's motion was not called to the trial court's attention until November 30, 1998, more than four months after the expiration of the period of limitation. Further, the affidavit of merit was filed after the expiration of the period of limitation and without an order by the trial court granting the motion to extend the time to file the affidavit. Because plaintiff was not granted an extension of time to file the affidavit of merit, and because a medical malpractice complaint filed without an affidavit of merit is insufficient to

> commence the lawsuit, the trial court properly dismissed the complaint with prejudice.

Id. at 692-693. The Court further explained that "[t]he plain language of subsection 2912d(2) indicates that the granting of an additional twenty-eight-day period in which to file an affidavit of merit *is not automatic*:"

> Rather, the trial court, by virtue of the permissive ("may") and conditional language ("good cause") has discretion to either grant or deny a plaintiff's motion.

Id. at 691-692.

In this case, Mr. Castro filed a notice of hearing with his motion to extend and obtained an order granting an extension; however, the hearing was held, and the order entered, after the statute of limitations expired. Nonetheless, the *Castro* majority allowed the post-expiration order extending the time to file the affidavit of merit to resurrect the time-barred claim, creating a direct conflict with *Barlett*, *Young* and numerous other unpublished Court of Appeals opinions that have relied upon *Barlett* and *Young* in reaching the same conclusion. See e.g., *Sosinski v Trosin*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2003 (Docket No. 239781), where the Court said, "[w]e conclude on the basis of *Barlett* that the trial court properly granted the motion for summary disposition because the court's actual grant of an extension of time did not occur until after the expiration of the statute of limitations." Similarly, in *Moya-Jure v Iung*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2004 (Docket No. 245670), the Court explained that the basis for the decision in *Young* "was the fact that the statute of limitations expired without an affidavit of merit having been filed or a motion to extend time to file the affidavit having been granted" and "*Young* … is binding authority under MCR 7.215(I)(1)." The Court further emphasized that the granting of plaintiffs' motion to extend "is irrelevant since the granting of the motion after the limitations period

expired did not revive plaintiffs' claim." *Id.* See also, *Inloes v Alton*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2005 (Docket No. 253841) ("It is not the mere filing of a motion to extend time that tolls the period of limitation [citing *Barlett* and *Young*]. Rather, it is the granting of such a motion that tolls the period of limitation"); *Ohannesian v Butterworth Hosp*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2004 (Docket No. 245933) ("the granting of the motion [to extend] after the statute of limitations expired did not revive plaintiffs' claim"); *Eskew v Pornpichit*, unpublished opinion per curiam of the Court of Appeals, issued June 29, 2001 (Docket No. 220554) ("we do not accept plaintiff's contention that the mere filing of a petition requesting the extension of time to file the affidavit of merit tolls the limitation period"); *Blackmon v Genesys Regional Medical Center*, unpublished opinion per curiam of the Court of Appeals, issued February 21, 2003 (Docket No. 234623) (affirming grant of summary disposition "because the court's actual grant of an extension of time did not occur until after the expiration of the statute of limitations").

References to these unpublished opinions are only to advise the Court that, until the decision in *Castro*, the rule of *Young* and *Barlett* had been consistently applied by numerous Court of Appeals' panels.[4] The aberrant decision of the *Castro* majority confuses this body of settled law and creates a quandary for future courts faced with similar issues. Further, it conflicts with the plain language of the statute it purports to apply.

E. The Decision of the *Castro* Majority Impermissibly Reads Words Into the Unambiguous Language of MCL 600.2912d(2).

The result reached by the *Castro* majority is not supported by the plain language of MCL 600.2912d(2). The statute does not toll the limitations period to accommodate a 28-day extension upon the filing of a motion to extend. Nor does it extend the limitations period itself.

[4] The unpublished decisions are attached to this application as Exhibit P.

Further, nothing in the statute allows for the retroactive revival of a time-barred claim. The statute simply states:

> Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

MCL 600.2912d(2).[5]

The *Castro* majority erred in relying upon dicta in *Solowy v Oakwood Hosp*, 454 Mich 214; 561 NW2d 843 (1997), as authority for interpreting MCL 600.2912d(2) as a retroactive tolling provision. MCL 600.2912d(2) was not at issue in *Solowy* and dicta is not precedent. See, e.g., *Auto-Owners Ins Co v All Star Lawn Specialists Plus*, 497 Mich 13, 21, n15; 857 NW2d 520 (2014) ("'Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication'"), quoting *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011).

---

[5] The Legislature knows what language to use when it intends an event to trigger tolling of the statute of limitations. See e.g., MCL 600.5856, where the Legislature provided:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> (a) *At the time* the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
>
> (b) *At the time* jurisdiction over the defendant is otherwise acquired.
>
> (c) *At the time* notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

Id. (emphasis added).

In sum, without an affidavit of merit the February 4, 2013 filing of Mr. Castro's complaint (even though accompanied by a motion to extend) was a nullity and did not toll the statute of limitations. The statute of limitations accordingly expired on February 9. All subsequent events, including the February 25 service of the AOM, the February 27 hearing on the motion to extend, and the March 8 entry of the order extending time, were powerless to revive the expired claim. Summary disposition should have been affirmed.

F. This Court Should Peremptorily Reverse For the Above Reasons and for the Reasons Expressed in Judge Wilder's Dissent.

Judge Wilder's dissenting opinion properly resolves the above issues and should be peremptorily adopted by this Court. The dissent challenges the majority's premise that the granting of a motion to extend "operate[s] retroactively to toll the running of the statute of limitations." As Judge Wilder explained:

> There is no dispute that plaintiffs' action was not commenced by February 9, 2013. There is also no dispute that, as of February 9, 2013, the running of the statute of limitations had not been tolled. Thus, as in *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 709; 620 NW2d 319 (2003), plaintiffs' efforts to remedy their failure to file their AOM with the complaint—in this case, the filing and ultimate granting of a motion to extend the time for filing an AOM pursuant to MCL 600.2912d(2)—were, unfortunately, insufficient because their efforts culminated *beyond* the limitations period.

Castro slip op. (WILDER, J., dissenting) at 2 (emphasis in original).

Judge Wilder observed that MCL 600.2912d(2) and the statute of limitations in MCL 600.5805(6) must be read harmoniously. Construing MCL 600.2912d(2) to require that an order granting the extension be issued before the limitations period expires allows the action to be commenced within the statute of limitations period, giving meaning to both statutes. *Castro* slip op. (WILDER, J., dissenting) at 2. The proposition that a claim barred by an expired statute of limitations "may be subsequently revived by action of a court of law" is, as Judge Wilder explained, unsupported. *Id*. at 3, n 2.

Equally unsupported is the assertion that the dissent's view of MCL 600.2912d(2) subjects the extension provision to the "vagaries" of the trial court's docketing clerk, who is charged with scheduling the motion for hearing. Judge Wilder appropriately noted that means are available to bring the urgent nature of a matter to the trial court's attention, but Plaintiffs made no attempt to do so:

> It is apparent from this record that plaintiffs did not use the means that they had available to them, which, if used, could have prevented the expiration of the statute of limitations before their motion to extend was granted. Pursuant to MCR 2.119(C), a trial court may adjust the time for service and filing of motions and responses "for good cause." Notably, plaintiffs did not request an expedited hearing of their motion to extend the time for filing the AOM, and they failed to emphasize on the cover page of their motion pleading that there was an urgency in hearing the pending motion because the statute of limitations would expire on February 9, 2013. Rather than a vagary, it is not an onerous expectation that a plaintiff in this circumstance would make more than a modicum of effort to seek an expedited hearing date from a trial court and docketing clerk, neither of which can be reasonably expected, without prompting by the moving party, to read through every pleading filed in the trial court in order to recognize that a particular matter requires urgent attention.

Id. at 3 (footnotes omitted).

Adhering to the precedent established by this Court and by the prior published decisions of the Court of Appeals, Judge Wilder's dissent properly resolves the issues raised on appeal. Peremptory reversal on that basis should be ordered.

II. The *Castro* Majority Erred in Defining "Good Cause" in the Context of MCL 600.2912d(2) to Mean That the Trial Court Was to Exercise Its "Best Judgment and Discretion" In Determining Whether Conditions Exist to Excuse the Delay, Rather Than Requiring a "Legally Sufficient" or "Substantial" Reason for the Delay.

A. Issues of Statutory Construction are Reviewed De Novo.

MCL 600.2912d(2) raises an important issue of statutory interpretation. As explained above, questions of statutory interpretation are reviewed de novo. *Mich Dep't of Transp v Tomkins*, 481 Mich at 190. The good cause requirement of MCL 600.2912d(2) establishes the burden a plaintiff must meet to extend the time for filing an affidavit of merit. In this case, the

Castro majority made a mockery of the "good cause" standard, stating that this "term has, in such undefined circumstances, been found 'so general and elastic in its import that we cannot presume any legislative intent beyond opening the door for the court to exercise its best judgment and discretion in determining if conditions exist which excuse the delay …'" (quoting *Lapham v Oakland Circuit Judge*, 170 Mich 564, 570; 136 NW 594 (1912)). *Castro* renders nugatory the good cause requirement. If the Legislature intended the grant of an extension to be limited by nothing more than the trial court's discretion, it would have included that language in the statute. Its incorporation of a good cause standard was obviously intended to invoke a greater burden.

B. Grounds Exist to Consider This Issue Because the Good Cause Standard Involves Principles of Major Significance to the State's Jurisprudence and *Castro's* Good Cause Analysis is Clearly Erroneous and Will Cause Material Injustice.

The issue raised by the good cause standard involves legal principles of major significance to the State's jurisprudence, invoking this Court's review under MCR 7.305(B)(3). As previously explained, MCL 600.2912d is an integral component of Michigan's tort reform statutes. Over the past decades, this Court has worked vigilantly to effectuate the legislative intent against interpretative encroachments upon the statutory framework. *Castro* presents another such challenge. Its dilution of the "good cause" standard deprives it of meaning and opens the floodgates to dilatory filings. Further, because *Castro* is a published opinion, the meaning it ascribes to good cause could very well set the standard in other, unintended contexts. This too could have an untoward effect on the jurisprudence of this state.

Castro's good cause analysis is clearly erroneous and will cause material injustice, satisfying the criteria for appeal set forth in MCR 7.305(B)(5)(a). The decision will deprive Dr. Goulet of the substantive defenses he is entitled to assert under MCL 600.2912d(1) and (2).

C. Good Cause Requires a Legally Sufficient or Substantial Reason.

MCL 600.2912d(2) permits (but does not require) the Court to extend the deadline for filing an affidavit of merit for 28 days upon a showing of good cause. Although the meaning of "good cause" is not defined in this context, good cause in the context of other rules has been defined to require a "legally sufficient or substantial reason." In *Russell v Miller (In re Utrera)*, 281 Mich App 1, 10-11; 761 NW2d 253 (2008), this Court explained:

> "Good cause" is not defined by court rule. Therefore, we consult a dictionary and caselaw to assist us in ascertaining its meaning. *In re FG*, *supra* at 418; *Richards v McNamee*, 240 Mich App 444, 451; 613 NW2d 366 (2000). Black's Law Dictionary (8th ed) defines good cause as "[a] legally sufficient reason." *See Richards*, *supra* at 451-453 (discussing the dictionary definition of "good cause" in applying MCR 2.102(D)). In the context of MCR 3.615(B)(3), this Court has defined good cause as "[a] legally sufficient reason" and "a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." *In re FG*, *supra* at 419 (internal quotation marks and citation omitted). We adopt the same definition here, and hold that ***in order for a trial court to find good cause for an adjournment, "a legally sufficient or substantial reason" must first be shown***.

Id. (emphasis added). See also, *Buchanan v City Council of Flint*, 231 Mich App 536, 545; 586 NW2d 573 (1998) ("good cause generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law") (internal quotations omitted).

In *Saffian v Simmons*, 477 Mich 8, 16; 727 NW2d 132, 136-137 (2007), this Court held that the defendant's "unilateral belief" that an affidavit of merit failed to conform with MCL 600.2912(d) did not constitute "good cause" for his failure to timely respond to a malpractice lawsuit. In the default context under MCL 2.603(D), this Court defined "good cause" to mean "(1) a substantial irregularity or defect in the proceeding upon which the default is based, (2) a reasonable excuse for failure to comply with the requirements that created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to

stand." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638, 645 (1999).

Noting that good cause was not defined in MCR 3.615(B)(3), the Court of Appeals defined "good cause" to mean a "legally sufficient reason" in *F.G. v Washtenaw Co Circuit Court (In re F.G.)*, 264 Mich App 413, 419; 691 NW2d 465, 468 (2004) (quoting Black's Law Dictionary (7th ed)). The *F.G.* court also referred to earlier Court of Appeals decisions relying on Black's Law Dictionary to define "good cause" as "a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." *Id*. (quoting *Richards v McNamee*, 240 Mich App 444, 452; 613 NW2d 366 (2000)).[6]

The good cause standard adopted by the *Castro* majority dilutes the statutory requirement and cannot be reconciled with more modern formulations. If peremptory reversal is not granted on the grounds articulated above, this Court should grant leave to address the appropriate statutory standard.

III. Given the Relevant Undisputed Facts, the *Castro* Majority's Finding of Good Cause Based Upon Alleged "Reassurances" Eviscerates the Good Cause Requirement of MCL 600.2912d(2) and Should Be Reversed.

A. Factual Findings Are Reviewed for Clear Error.

Findings of fact are reviewed for clear error. *Miller-Davis v Ahrens Constr, Inc*, 495 Mich 161, 172; 848 NW2d 95 (2014). "A factual finding is clearly erroneous if there is no substantial evidence to sustain it or if, although there is some evidence to support it, the

[6] Although "good cause" was not the issue before this Court in *Solowy*, the Court there contemplated that in the delayed diagnosis context, good cause for a 28-day extension to file an affidavit of merit "should be shown" by an expert's letter "indicating that a possible cause of the injury relates to the alleged negligent act or omission and that further time is required for testing in order to confirm the suspected cause." 454 Mich at 229, n 6.

reviewing court is left with the definite and firm conviction that a mistake has been committed." *Id*. at 172-173 (footnotes omitted).

B. Grounds for Review Exist Under MCR 7.305 (B)(3) and (5)(a).

The issue raised by the *Castro* majority's application of the good cause standard also involves legal principles of major significance to the State's jurisprudence, invoking this Court's review under MCR 7.305(B)(3). As previously explained, MCL 600.2912d is an integral component of Michigan's tort reform statutes and its utility will be impacted by the manner in which the good cause standard is to be applied. Here, the *Castro* majority ignored the undisputed facts relevant to good cause, and clung instead to a single allegation of reassurance that does not justify the lengthiness of Mr. Castro's delay. Because *Castro* is a published opinion, its misguided approach will unquestionably have sway on future litigants. "Reassurance" could well become the mantra of tardy litigants who do not timely satisfy the affidavit of merit requirement.

Castro's good cause analysis is clearly erroneous and will cause material injustice, satisfying the criteria for appeal set forth in MCR 7.305(B)(5)(a). The decision will deprive Dr. Goulet of the substantive defenses he is entitled to assert under MCL 600.2912d(1) and (2).

C. Given the Undisputed Facts Relevant to Good Cause, the Standard Cannot Be Satisfied.

Here, the sole basis for *Castro*'s good cause finding was an alleged reassurance that Mr. Castro's symptoms would subside within "weeks or months" of the surgery. The *Castro* majority explained:

> Significantly to the issue on appeal, defendants contended that plaintiffs had unreasonably procrastinated in bringing the instant action. Plaintiffs argued that the reason for the delay was that doctors had told Ruben "that erectile dysfunction which may occur from surgery in which a perineal traction post is utilized goes away, after weeks or months" but that no such promised recovery occurred for Ruben. Plaintiffs stated they would have filed the lawsuit earlier if medical professionals had not advised Ruben that erectile dysfunction would subside and then completely phase out weeks or months after surgery. In other words,

> plaintiffs delayed because of defendants' assurances that the complications Ruben suffered would end on their own. The purpose of the AOM requirement in MCL 600.2912d is to deter the filing of frivolous medical malpractice claims. *VandenBerg v VandenBerg*, 231 Mich App 497, 502-503; 586 NW2d 570 (1998). Plaintiffs attempted, on the basis of defendants' assurances, to achieve precisely the same effect and avoid filing a needless suit. Under the circumstances, we simply cannot find that the trial court's decision to allow plaintiffs the 28-day extension was outside the range of principled outcomes. The trial court had ample grounds to find good cause and we find there is no abuse of discretion in granting the allowed statutory extension.

Castro Slip op. at 4-5.

This finding of good cause makes a mockery of the good cause requirement. The purported reassurance that the symptoms would "phase out" within weeks or months of the surgery does not explain a delay of nearly two years. Indeed, Mr. Castro actually acted much earlier to initiate his claim. Less than seven months after the surgery, Mr. Castro retained an attorney to pursue his claim through the issuance of a notice of intent. See August 25, 2011 NOI (Exhibit D). The NOI is skeptical of the purported reassurance that the symptoms will subside. The NOI states in part:

> There had been excessive pressure encountered in the perineum. Dana A. Ohl, MD., further described the numbness of Ruben C. Castro's penis was very similar of what is seen in competitive bicyclists from their use of a bicycle seat, which is similar to the post seen in the Orthopedic Surgery Suite. Dana Ohl, MD., stated individuals who have perineal pressure symptoms the same are resolved within several weeks of the cessation of using the bicycle seat. However, the fact of the matter is 6½ months have passed, since the surgical procedure, and Ruben C. Castro continues to suffer numbness . . . Sensation has not returned, his pain continues, and his erectile dysfunction also continues …

Numerous communications with the University of Michigan Health System ("UMHS") representatives followed, through which Mr. Castro's counsel would have learned that Defendants viewed Mr. Castro's claim as utterly lacking in merit. *See e.g.*, Response to Notice of Intent (Exhibit L); Response to Motion to Extend (Exhibit I); Affidavit of Vicki E. Young (Exhibit M). On April 14, 2012, Mr. Castro's counsel threatened to file suit within 20 days. *See*

Letter from James Wines (Exhibit N). This threat was made nearly ten months before the complaint was actually filed.

In his motion to extend, Mr. Castro argued: (1) that his lawyer had been referred to Dr. Nunley, the physician who executed the affidavit of merit Mr. Castro ultimately filed, by an expert witness service on January 16, 2013; (2) that Dr. Nunley was retained on January 18, 2013; (3) that the medical records and Notice of Intent were sent by overnight mail to Dr. Nunley on January 18, 2013; and (4) that Dr. Nunley was supposedly too busy to sign an affidavit of merit. Motion to Extend (Exhibit F). Mr. Castro also alleged that he had been told by "medical physicians" that the erectile dysfunction "goes away, after weeks or months." However, Dr. Nunley's own testimony shows that he was actually contacted at a much earlier date. During a January 16, 2013 deposition in a different case, Dr. Nunley testified as follows:

Q. (By Mr. McLain) When did you last consult with Jim Wines?

A. He happened to call me last week.

Q. What's your understanding of the Jim Wines case?

A. That they have not filed anything. He wants me to review the records for another nerve injury case.

Q. Did you agree to do that?

A. I told him I would look at the records.

Q. This is not a case you had seen before?

A. No.

Q. He just called you last week?

A. ***I had been contacted maybe 4 or 5 months ago about it and told him the – somebody who asked if I would review it, and I said yes, but I never got anything, and then he called out of the blue last week.***

Q. The person who called you before was someone other than Jim Wines?

A. Correct.

Q. Have you actually seen the records in that case yet?

A. No, only a summary.

See Excerpt of Nunley Dep. Tr at 36 (lines 2-25) (Exhibit O) (emphasis added).

Dr. Nunley's acknowledgement that he had been called by Mr. Castro's lawyer the week prior to January 16 and by another person on the same case "maybe 4 or 5 months ago" evidences procrastination and belies the existence of good cause. The *Castro* majority's failure to consider these undisputed facts demeans the good cause inquiry and sends the wrong message to lawyers and litigants. For this reason as well, leave to appeal is respectfully requested.

RELIEF REQUESTED

The Trial Court's grant of summary disposition was soundly supported by settled (and binding) law. The *Castro* majority impermissibly departed from that precedent, creating a conflict in the law that can only be resolved by this Court. The majority likewise misconstrued and misapplied the statutory "good cause" standard. It is respectfully requested that this Court grant leave to appeal and peremptorily reverse or reverse after hearing the aberrant Court of Appeals decision and reinstate the Trial Court's order granting summary disposition in favor of Defendants-Appellants James Alan Goulet, M.D., and James Alan Goulet, M.D., P.C.

Dated: September 30, 2015

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2015, I electronically filed the foregoing Application for Leave to Appeal (Corrected) with the Clerk of the Court using the ECF system and served a copy upon James D. Wines, Esq., 2254 Georgetown Boulevard, Ann Arbor, MI 48105 by First Class Mail.

Dated: October 1, 2015

KERR, RUSSELL AND WEBER, PLC

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STATE OF MICHIGAN

IN THE SUPREME COURT

RUBEN CASTRO and CHRISTY CASTRO, Jointly and severally,

Plaintiffs-Appellees,

v.

JAMES ALAN GOULET, M.D., and JAMES ALAN GOULET, M.D. P.C., jointly and severally,

Defendants-Appellants.

Supreme Court Case No.

Court of Appeals Case No. 316639

Washtenaw County Circuit Court Case No. 13-138-NH

Honorable David S. Swartz

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Exhibit B	Order Granting Summary Disposition
Exhibit C	March 8, 2013 Order Granting Motion to Extend
Exhibit D	Notice of Intent
Exhibit E	Complaint
Exhibit F	Motion to Extend Time to File Affidavit of Merit
Exhibit G	Affidavit of Merit and Certificate of Service
Exhibit H	February 27, 2013 Transcript of Hearing
Exhibit I	Dr. Goulet's Response to Motion to Extend
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Exhibit P	Unpublished Opinions

EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

RUBEN CASTRO and CHRISTY CASTRO,

Plaintiffs- Appellants,

v

JAMES ALAN GOULET, MD and JAMES ALAN GOULET MD, PC,

Defendants-Appellees,

and

STEPHEN R. TOLHURST, MD[1]

Defendant.

FOR PUBLICATION
August 20, 2015
9:00 a.m.

No. 316639
Washtenaw Circuit Court
LC No. 13-000138-NH

Before: RONAYNE KRAUSE, P.J., and WILDER and STEPHENS, JJ.

RONAYNE KRAUSE, P.J.

Plaintiffs appeal as of right an order granting defendants' motion for summary disposition of their medical malpractice claim under MCR 2.116(C)(7) for the failure to file an affidavit of merit (AOM) with their complaint within the two-year period of limitations. Instead of an AOM, plaintiffs filed with their complaint a motion to extend the time for filing an AOM as provided for by MCL 600.2912d(2). The trial court granted that motion, however subsequently granted summary disposition on the grounds that the action itself was untimely. We reverse and remand.

This Court reviews de novo matters of statutory interpretation, as well as the trial court's decision to grant or deny a motion for summary disposition. See *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). Summary disposition pursuant to MCR 2.116(C)(7) is appropriate if a "claim is barred by an applicable statute of limitations." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). "In reviewing a motion under subrule (C)(7), a court

[1] The parties stipulated to dismiss Stephen R. Tolhurst, MD from the case with prejudice and without costs.

accepts as true the plaintiff's well-pleaded allegations of fact, construing them in the plaintiff's favor." *Id*. We otherwise review de novo the trial court's determinations of law; however, any factual findings made by the trial court in support of its decision are reviewed for clear error, and ultimate discretionary decisions are reviewed for an abuse of that discretion. *Herald Co*, *Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470-472; 719 NW2d 19 (2006). Under the clear error standard, this Court defers to the trial court unless definitely and firmly convinced that the trial court made a mistake, and under the abuse of discretion standard, this Court "cannot disturb the trial court's decision unless it falls outside the principled range of outcomes." *Id*. at 472.

An AOM generally must be filed with a medical malpractice complaint. MCL 600.2912d(1). Ordinarily, a complaint filed without an AOM is "insufficient to commence the lawsuit" and does not toll the statute of limitations. *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). However, the Legislature has provided for certain narrow exceptions to that general requirement; in relevant part, MCL 600.2912d(2) provides:

> Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

Consequently, a medical malpractice plaintiff may, under appropriate circumstances, be permitted to file their AOM up to 28 days *after* filing the complaint.[2] Our Supreme Court has expressly recognized that a plaintiff may be unable to obtain an AOM within the requisite time period, in which case "the plaintiff's attorney *should* seek the relief available in MCL 600.2912d(2)." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 228-229; 561 NW2d 843 (1997) (emphasis added). If the trial court finds "a showing of good cause, an additional twenty-eight days [are permitted] to obtain the required affidavit of merit." *Id*. at 229. "During this period, the statute will be tolled and summary disposition motions on the ground of failure to state a claim should not be granted." *Id*.

This Court has clarified that it is ultimately the granting of the motion that effectuates the 28-day tolling, not merely filing the motion. *Barlett v North Ottawa Community Hosp*, 244 Mich

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[2] Other exceptions may apply under circumstances not relevant to the instant matter. We do not discuss any such additional exceptions here. We also note that we are aware that our Supreme Court has recently reiterated that "a medical malpractice action can only be commenced by filing a timely NOI and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but before the period of limitations has expired." *Tyra v Organ Procurement Agency of Michigan*, ___ Mich ___, ___; ___ NW2d ___ (2015), slip op at p 21. This general rule governing the commencement of medical malpractice actions is inapplicable here. The exception at issue here was neither before the Court in *Tyra* nor even mentioned by the Court, and the Court emphasized in no uncertain terms that matters not directed to its attention by counsel would not be considered. *Id*. at ___ (slip op at pp 15-17). *Tyra* adds nothing to the question at issue in the case at bar.

App 685, 692; 625 NW2d 470 (2001). Furthermore, the tolling period only runs from the date the complaint is filed; it cannot resurrect a claim where the complaint itself was untimely. *Ligons v Crittenton Hosp*, 490 Mich 61, 74-75, 84-85; 803 NW2d 271 (2011). However, plaintiffs filed their complaint here within the two-year limitations period, their motion was granted,[3] and they filed their AOM fewer than 28 days after the date of the filing of their complaint.[4] Consequently, plaintiffs acted properly pursuant to both statute and case law.[5]

Defendants and the dissent believe it is relevant that the trial court granted plaintiffs' motion on March 8, 2013, which is of course well after the expiration of the 28-day period. The only relevance is the fact that, as noted, the trial court actually granted the motion. MCL 600.2912d(2) explicitly affords "an additional 28 days in which to file the affidavit required under subsection (1)," which in turn specifies that the affidavit should be filed with the complaint. Our Supreme Court's discussion of the statute likewise articulates the need for an AOM at the commencement of an action, unless an *additional* 28 days are provided by the granting of a motion under MCL 600.2912d(2). *Ligons*, 490 Mich at 84-85; *Solowy*, 454 Mich at 229 (emphasis added). That period is "an extension." *Scarsella*, 461 Mich at 552. By statute and by precedent, the 28-day period must run from the date the complaint is filed, irrespective of when the motion is granted. Not only would a contrary holding violate the plain reading of the statute, it would also make a plaintiff's rights turn not on plaintiff's compliance with the

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[3] Defendants raise an alternative argument that no "good cause" was shown. As we will discuss *infra*, we disagree.

[4] The alleged malpractice occurred on February 9, 2011, so the limitations period was set to expire on February 9, 2013. See MCL 600.5805(6). Plaintiffs filed their complaint and their motion to extend the time for filing an AOM on February 4, 2013, and their AOM on February 26, 2013. The dissent relies on our Supreme Court's analysis in *Gladych v New Family Homes, Inc*, 468 Mich 594, 603-604; 664 NW2d 705 (2003), for the proposition that the notice period expired and therefore rebooted, necessitating a new summons and complaint. This ignores the fact that *by statute*, MCL 600.2912d(2) provides for an *extension* of the period within which to file and for what is effectively the "perfection" of a complaint initially filed without an AOM with a later filing of the AOM. Furthermore, the continuing vitality of *Gladych* is doubtful, given that the Legislature amended MCL 600.5856 after that case was decided to clarify that the statute of limitations is tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules." The tolling criteria were satisfied here.

[5] We are puzzled by the dissent's citation to *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 709; 620 NW2d 319 (2003). In that case, this Court explicitly stated that the limitation period at issue was not tolled and thus the claim was not timely brought "[b]ecause plaintiffs failed to comply with MCL 600.2912d; MSA 27A.2912(4) by filing an affidavit of merit with their complaint *or by requesting an extension of time in which to file their complaint*." *Id.* (emphasis added). *Holmes* supports rather than refutes our position. Moreover, *Holmes* does not address the impact of a trial court's delayed grant of a requested extension. We fail to perceive the relevance of *Holmes*.

procedures established by the Legislature, but rather purely on the vagaries of when the trial court, or more likely not even the court but rather a docketing clerk, chooses to hear or docket the motion. In effect, the dissent and defendants would render MCL 600.2912d(2) nugatory.[6]

The obvious significance of the timing requirements in MCL 600.2912d(2) is that a plaintiff who makes a motion to extend time must proceed on the assumption that the motion will be granted. Conversely, the trial court need not go to particular lengths to rush the matter, which could risk a less-than-optimal decision for either party. Because plaintiffs complied with the requirements of the statute, and they filed their complaint and motion within the two-year limitations period and their AOM within 28 days thereafter, the only remaining issue is defendant's alternate argument that plaintiffs failed to show good cause.

"Good cause" is not defined in the statute. The term has, in such undefined circumstances, been found "so general and elastic in its import that we cannot presume any legislative intent beyond opening the door for the court to exercise its best judgment and discretion in determining if conditions exist which excuse the delay when special circumstances are proven to that end." *Lapham v Oakland Circuit Judge*, 170 Mich 564, 570; 136 NW 594 (1912). The trial court's finding of good cause, or for that matter of a lack of good cause, is consequently a highly discretionary one. *Id*. at 570-571. As discussed, we will disturb a trial court's exercise of discretion only if the result falls outside the range of principled outcomes. *Herald Co*, *Inc*, 475 Mich at 472.

According to the complaint, defendant doctors performed a left hip arthroscopy surgical procedure on plaintiff Ruben Castro. Before the surgery, he did not have erectile dysfunction, but afterward, he suffered from decreased sensation in his penis, pain when urinating, and erectile dysfunction causing the inability to procreate. Plaintiffs alleged that Ruben's injuries were caused by defendants' negligent "use of the perineal traction post using excessive pressure, and employing the same for a period in excessive [sic] of two [2] hours both being contrary to the standard of practice." Plaintiffs also alleged that defendants failed to inform Ruben that erectile dysfunction was a possible consequence of the procedure. Plaintiffs contend that he would not have undergone surgery if he had known of that possible side effect. In addition to negligence, plaintiffs alleged a loss of consortium.

Significantly to the issue on appeal, defendants contended that plaintiffs had unreasonably procrastinated in bringing the instant action. Plaintiffs argued that the reason for the delay was that doctors had told Ruben "that erectile dysfunction which may occur from surgery in which a perineal traction post is utilized goes away, after weeks or months" but that no such promised recovery occurred for Ruben. Plaintiffs stated they would have filed the lawsuit earlier if medical professionals had not advised Ruben that erectile dysfunction would subside and then completely phase out weeks or months after surgery. In other words, plaintiffs

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[6] The dissent inexplicably concludes that plaintiffs are *not* at the mercy of the potentially capricious or arbitrary whims of a docketing clerk or a potentially full docket, because plaintiffs can—and plaintiff here did not—express a plea for expeditiousness. We are unable to locate any Court Rule or statute requiring such a plea.

delayed because of defendants' assurances that the complications Ruben suffered would end on their own. The purpose of the AOM requirement in MCL 600.2912d is to deter the filing of frivolous medical malpractice claims. *VandenBerg v VandenBerg*, 231 Mich App 497, 502-503; 586 NW2d 570 (1998). Plaintiffs attempted, on the basis of defendants' assurances, to achieve precisely the same effect and avoid filing a needless suit. Under the circumstances, we simply cannot find that the trial court's decision to allow plaintiffs the 28-day extension was outside the range of principled outcomes. The trial court had ample grounds to find good cause and we find there is no abuse of discretion in granting the allowed statutory extension.

The trial court properly granted plaintiffs' motion to extend the time in which to file their AOM, and plaintiffs properly complied with all of the timing requirements set forth in MCL 600.2912d. Consequently, plaintiffs' action was timely commenced, and the trial court should not have granted summary disposition pursuant to MCR 2.116(C)(7) on the basis of it being untimely. We therefore reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Cynthia Diane Stephens

STATE OF MICHIGAN

COURT OF APPEALS

RUBEN CASTRO and CHRISTY CASTRO,

Plaintiffs- Appellants,

V

JAMES ALAN GOULET, MD and JAMES ALAN GOULET MD, PC,

Defendants-Appellees,

and

STEPHEN R. TOLHURST,

Defendant.

FOR PUBLICATION
August 20, 2015

No. 316639
Washtenaw Circuit Court
LC No. 13-000138-NH

Before: RONAYNE KRAUSE, P.J., and WILDER and STEPHENS, JJ.

Wilder, J. (*dissenting*).

I respectfully dissent.

In *Tyra v Organ Procurement Agency of Mich*, ___ Mich ___, ___; ___ NW2d ___ (2015) (Docket Nos. 148079, 148087, 149344); slip op at 21, our Supreme Court reiterated that:

> Although a civil action is generally commenced by filing a complaint, a medical malpractice action can only be commenced by filing a timely NOI and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but *before* the period of limitations has expired. [Emphasis added.]

This holding by the Supreme Court reflects the rule of law, established in *Scarsella v Pollak*, 461 Mich 547, 549-550; 607 NW2d 711 (2000), that "for statute of limitations purposes in a medical malpractice action case, the mere tendering of a complaint without the required affidavit of merit [("AOM")] is insufficient to commence the lawsuit."

In the instant case, when plaintiffs filed their complaint on February 4, 2013, they did not file an AOM. Thus, the action against defendants did not commence on February 4, 2013. However, plaintiffs filed a motion to extend the time for filing the requisite AOM pursuant to MCL 600.2912d(2). The trial court granted that motion on March 8, 2013, and the majority concludes that the granting of that motion operated retroactively to toll the running of the statute

of limitations, such that "plaintiffs acted properly pursuant to both statute and case law," and plaintiffs' complaint is deemed timely filed. I respectfully disagree.

The period of limitations for an action charging malpractice is two years. MCL 600.5805(6). Plaintiffs allege that malpractice by the defendants occurred on February 9, 2011. Thus, the statute of limitations for defendants' alleged malpractice, absent tolling, was scheduled to expire on February 9, 2013. This means that plaintiffs were required to commence their action against defendants by February 9, 2013, unless the running of the limitations period was tolled by virtue of some action taken by plaintiffs. There is no dispute that plaintiffs' action was not commenced by February 9, 2013. There is also no dispute that, as of February 9, 2013, the running of the statute of limitations had not been tolled. Thus, as in *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 709; 620 NW2d 319 (2003), plaintiffs' efforts to remedy their failure to file their AOM with the complaint—in this case, the filing and ultimate granting of a motion to extend the time for filing an AOM pursuant to MCL 600.2912d(2)—were, unfortunately, insufficient because their efforts culminated *beyond* the limitations period.

The majority concludes that this application of *Scarsella* and its progeny renders MCL 600.2912d(2) nugatory. I disagree. As statutes sharing a common purpose, MCL 600.2912d(2) and MCL 600.5805(6) must be read together as one and construed in a way that produces a harmonious whole. *Basic Prop Ins Ass'n v OFIR*, 288 Mich App 552, 559-560; 808 NW2d 456 (2010) ("When construing statutes, the terms of statutory provisions with a common purpose should be read *in pari materia*. . . . Conflicting provisions of a statute must be read together to produce an harmonious whole and to reconcile any inconsistencies wherever possible." [Quotation marks and citations omitted.]); *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 563; 710 NW2d 59 (2005) ("Statutes that relate to the same subject must be read together as one, even if they contain no reference to one another."). In my judgment, construing MCL 600.2912d(2) in a manner which requires a plaintiff to obtain a court order granting the extension to file the AOM *before* the statute of limitations expires, such that the cause of action against a defendant is *commenced before* the statute of limitations expires, gives meaning to both statutes.

The defining principle of law is that an action must be commenced before the period of limitations for that cause of action expires. See MCL 600.5805(1) ("A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is *commenced* within the periods of time prescribed by this section." [Emphasis added.]); *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006); *Gladych v New Family Homes, Inc*, 468 Mich 594, 598; 664 NW2d 705 (2003), superseded by statute on other grounds. Operating together, it is clear that the statutes underlying medical malpractice claims respect that defining principle of law. Under MCL 600.5856(c), the filing of a notice of intent to file suit tolls the running of the statute of limitations. *Tyra*, ___ Mich at ___; slip op at 7. Upon expiration of the notice period, the period of limitations begins running anew, cf. *Gladych*, 468

Mich at 603-604,[1] and the filing of a complaint and affidavit of merit, MCL 600.2912d(1), or the granting of a motion for an extension of time to file the AOM, MCL 600.2912d(2), once again operate to toll the running of the statute of limitations. *Tyra*, ___ Mich at ___; slip op at 7; *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 229; 561 NW2d 843 (1997). However, each effort to toll the running of the statute of limitations, as well as the commencement of plaintiffs' cause of action, must occur before the statute of limitations expires.[2]

The majority holds that construing MCL 600.2912d(2) to mean something other than that "the 28-day period must run from the date the complaint is filed, irrespective of when the motion is granted," would "make a plaintiff's rights turn not on the substance of the case or the plaintiff's compliance with the procedures established by the Legislature, but rather purely on the vagaries of when the trial court, or more likely not even the court but rather a docketing clerk, chooses to hear or docket the motion." Again, I respectfully disagree. It is apparent from this record that plaintiffs did not use the means that they had available to them, which, if used, could have prevented the expiration of the statute of limitations before their motion to extend was granted. Pursuant to MCR 2.119(C), a trial court may adjust the time for service and filing of motions and responses "for good cause." Notably, plaintiffs did not request an expedited hearing of their motion to extend the time for filing the AOM, and they failed to emphasize on the cover page of their motion pleading that there was an urgency in hearing the pending motion because the statute of limitations would expire on February 9, 2013.[3] Rather than a vagary, it is not an onerous expectation that a plaintiff in this circumstance would make more than a modicum of effort to seek an expedited hearing date from a trial court and

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[1] Rather than as precedent binding in the instant case, I cite to *Gladych* merely to illustrate, by analogy, that the statute of limitations begins running anew after previously being properly tolled for some period of time.

[2] Moreover, although in *Pryber v Marriott Corp*, 98 Mich App 50, 56-57; 296 NW2d 597 (1980), this Court concluded that the Legislature, through the enactment of a retroactive law, may revive a cause of action which has already been barred by the application of a previously existing statute of limitations, I am unable to find any case law, and the majority cites to none, which supports the proposition that a cause of action barred by the application of an expired statute of limitations, because that action was not timely commenced, may be subsequently revived by action of a court of law.

[3] Not only did the cover page of plaintiffs' motion not contain any information that would have alerted the trial court or the docketing clerk that the motion required urgent attention, the contents of the motion stated only the following with regard to the urgency attendant to the filing of the motion: On page three of the motion, plaintiffs stated that "it appears that the [AOM] shall not be prepared until after February 8, 2013," due to the expert's busy schedule. Also on page three, plaintiffs explained that, "[a]lthough it may appear [that] the filing of this medical malpractice action was held to the last possible time," they waited to file their claim because plaintiff Ruben Castro had been informed that his symptoms would cease some number of weeks or months after the surgery, and he still suffered from the condition "just short of two [2] years from the date of surgery on February 9, 2011." While plaintiffs hint at a statute of limitations problem, plaintiffs' pleading did not expressly identify this impending problem for the trial court.

docketing clerk, neither of which can be reasonably expected, without prompting by the moving party, to read through every pleading filed in the trial court in order to recognize that a particular matter requires urgent attention. Thus, contrary to the majority, I would find that plaintiffs failed to make reasonable efforts to request that the trial court suspend the normal time limits imposed under MCR 2.119(C) due to the impending expiration of the statute of limitations, and that the facts of this case do not warrant holding either the trial court or the docketing clerk responsible for plaintiffs' failure to commence their cause of action against defendants in a timely manner.

Contrary to the majority's findings, I would find that: 1) because plaintiffs did not file the AOM with the complaint on February 4, 2013, the lawsuit was not commenced under *Scarsella*; 2) under *Ligons* and *Barlett*, the filing of the motion to extend time for filing the AOM had no tolling effect; and 3) because the statute of limitations expired on February 9, 2013, before it granted the motion to extend, the trial court properly found that its March 8, 2013 order had no tolling effect.

I would affirm.

/s/ Kurtis T. Wilder

EXHIBIT B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO and CHRISTY CASTRO,
Jointly and severally,

Plaintiff,

v.

JAMES ALAN GOULET, M.D., and JAMES ALAN GOULET, M.D. P.C., jointly and severally,

Defendants.

Case No. 13-138-NH

Honorable David S. Swartz

/

JAMES D. WINES (P22436)
Attorney for Plaintiffs
P.O. Box 130478
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734-996-2722

PATRICK McLAIN (P25458)
DANIEL J. FERRIS (P69633)
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Attorneys for Defendants
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ORDER GRANTING SUMMARY DISPOSITION TO DEFENDANT

At a session of said Court held in the Courthouse in Ann Arbor, Michigan, on MAY 14 2013.

PRESENT: THE HONORABLE DAVID S. SWARTZ
Circuit Court Judge

Upon Motion of Defendant, and upon hearing on May 8, 2013, for the reasons stated by the Court at the hearing;

IT IS ORDERED THAT Defendant's Motion for Summary Disposition is granted.

This is a final order which disposes of the entire case.

/S/ DAVID S. SWARTZ

David S. Swartz, Circuit Court Judge

~~Notice of Entry Waived~~:

APPROVED AS TO FORM ONLY

JAMES D. WINES (P22436)
Attorney for Plaintiffs

PATRICK McLAIN (P25458)
Attorney for Defendant

EXHIBIT C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO and CHRISTY CASTRO,
Jointly and severally,

Plaintiff,

v.

JAMES ALAN GOULET, M.D., JAMES ALAN GOULET, M.D. P.C., and STEPHEN R. TOLHURST, M.D., jointly and severally,

Defendants.

Case No. 13-138-NH

Honorable David S. Swartz

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ORDER GRANTING PLAINTIFFS' MOTION TO EXTEND TIME FOR FILING AFFIDAVIT OF MERIT 28 DAYS

At a session of said Court held in the Courthouse Building, in Ann Arbor, Michigan, on the 8th day of March, 2013.

PRESENT: THE HONORABLE DAVID S. SWARTZ
Circuit Court Judge

Upon Motion of Plaintiff, and upon hearing, the Court being fully informed of the pertinent circumstances;

IT IS ORDERED THAT Plaintiffs' Motion is granted, and Plaintiffs' deadline to file the Affidavit of Merit is extended 28 days.

Circuit Judge

Prepared By

Notice of Entry Waived:

JAMES D. WINES (P22436)
Attorney for Plaintiffs

Patrick McLain (P25458)
Attorney for Defendants

EXHIBIT D

NOTICE OF INTENTION TO FILE A CLAIM PURSUANT TO MCL 600.2912B;
BY RUBEN C. CASTRO, AND CHRISTY CASTRO, HIS WIFE

TO: Potential Defendants:

UNIVERSITY of MICHIGAN HEALTH SYSTEMS ✓
University of Michigan Hospital - Risk Management
1500 E. Medical Center Dr.
Ann Arbor, MI., 48109

JAMES L. GOULET, MD., Professor
University of Michigan Orthopedics
1500 East Medical Center Dr., 2ND Floor, TC 2912
Ann Arbor, MI., 48109

STEPHEN R. TOLHURST, MD. , Fellow
1500 East Medical Center Dr.
Ann Arbor, MI. 48109

DAVID RUTA, MD., Resident Physician
1500 East Medical Dr.
Ann Arbor, MI., 48109

JOE THOMAS KOFOED, MD., Resident Physician
1500 East Medical Dr.
Ann Arbor, MI., 48109

1. Factual Basis of Claim

Ruben C. Castro had been developing left hip pain, and was referred over by Jennifer Doble, MD., to James L. Goulet, MD, and Orthopedic Surgeon at the University of Michigan Health Systems. James L. Goulet, MD., had Ruben C. Castro undergo a left diagnostic hip injection from which he got dramatic relief. James L. Goulet, MD., also had Ruben C. Castro undergo a CT Scan.

Thereafter James L. Goulet, MD., offered Ruben C. Castro a left diagnostic hip arthroscopy, and possible debridement thereof. In doing so James L. Goulet, MD., did not make mention of possible neurological complications (injury), nor did any other employee of the University of Michigan Health Services make any mention of possible neurological complications (injury) arising from the use of the perinea traction post, including but not limited to resulting perineal nerve palsy, numbness of the penis, erectile dysfunction, and/or haematoma. Ruben C. Castro denied any numbness, paresthesias, or weakness.

On February 9, 2010, Ruben C. Castro, was taken to the operating room, and underwent a diagnostic left hip arthroscopy with labral debridement, and

intra-articular synovectomy by James L. Goulet, MD. During the course of the operative procedure a perineal traction post was utilized as well as a Smith and Nephew padded traction boots. It is alleged care was taken to pad all bony prominences and cutaneous nerves. Ruben C. Castro's right lower extremity was placed in the well leg contra lateral traction boots, and the left leg was placed in the ipsilateral traction system with the leg in abduction, traction was applied, and the leg adducted and the foot internally rotated. Fluoroscopy confirmed excellent distraction of the joint to approximately 8 millimeters. The left lower extremity was prepped and draped. Kefzol was administered.

Arthroscopy was initiated using a proximal anterolateral arthroscopy portal. It was placed at the junction of the tensor fascia lata and gluteus medius. This was the labrum. A modified anterior portal was subsequently established, and anterior partal established with a spinal needle without implication entering at this junction of the capsule and the labrum. The camera was moved to the modified anterior portal, and using a heaver blade, an intraportal capsulotomy was completed, extending the cut interiorly to the level of the psoas tendon. An inflamed hemorrhagic synovitis both on the extra capsular and intracapsular sides were noted. Using a curved shaver, these edges were derided to stable margins. The anterosuperior labral tear was noted, and was derided back to a stable rim.

Examination of the chondral surfaces reveled no significant degenerative changes. The ligament teres was intact. The psoas tendon was without inflammation or tenosynovitis warranting a release. The femoral head cartilage was intact, with no evidence of femoral head dysmorphic changes.

All bony debris was removed, and a thorough synovectomy was performed. The was no evidence of instability.

On February 9, 2011, James L. Goulet, MD., reported Ruben C. Castro was without intra-op complications, and had tolerated the procedures well. Ruben C. Castro was transferred to surgical observation in stable condition for overnight post-op pain management.

Ruben C. Castro reported decreased sensation in his penis to light touch over the majority of bilateral sides thereof prior to being discharged from the University of Michigan Hospital on February 10, 2010.

Ruben C. Castro was 'consulted out' to Dana A. Ohl, MD., a Professor of Urology at the University of Michigan Hospital, and on February 24, 2011, noted since the surgical procedure Ruben C. Castro had complained of penis numbness after the surgery, as well as pain when urinating. Dana A. Ohl, MD., stated most likely there was pressure encountered to the perineum caused by the usage of the perineal traction post regardless of the multiple precautions with padding alleged to have been taken by James L. Goulet, MD, and the OR team.

There had been excessive pressure encountered in the perineum. Dana A. Ohl, MD., further described the numbness of Ruben C. Castro's penis was very similar of what is seen in competitive bicyclists from their use of a bicycle seat, which is similar to the post seen in the Orthopedic Surgery Suite. Dana Ohl, MD., stated individuals who have perineal pressure symptoms the same are resolved within several weeks of the cessation of using the bicycle seat. However, the fact of the matter is 6 ½ months have passed, since the surgical procedure, and Ruben C. Castro continues to suffer numbness in his *penis, and* is without the ability of his penis to be stimulated (erectile dysfunction). Sensation has not returned, his pain continues, and his erectile dysfunction also continues, after the use of the perineal traction post during surgery.

On March 22, 2011, in a follow up appointment with James L. Goulet, *MD.*, Ruben C. Castro had many questions regarding the numbness, and pain he was experiencing in his penis with the staff attending James L. Goulet, MD. Approximately 15 or 20 minutes was spent with the staff attending James L. Goulet, MD., discussing the situation, the possibilities of its occurrence including intraoperative pressure on nerves and addressing this issue of postoperative swelling. James L. Goulet stated he had discussed Ruben C. Castro's numbness of his penis with Dana A. Ohl, MD., regarding the belief there would be a return of sensation within the next few months, and that Ruben C. Castro would follow up with Urology regarding these urological issues.

On June 1, 2011, in a followup Dana A. Ohl, MD., recognized Ruben C. Castro's continuing numbness of his penis, and erectile dysfunction noting there was a firmness of the penis upon examination. Dana A. Ohl, MD., assumed that his condition was a nerve injury, and Ruben C. Castro was being sent to the Physical Medicine Electrodiagnostic Group to perform a nerve conduction velocities to determine what was going on with Ruben C. Castro. Dana A. Ohl, MD., stated is was a possibility there would be Doppler Studies as well.

Dana A. Ohl, MD., also put Ruben C. Castro on Cialis, however, the same has not made a difference in the numbness of Ruben C. Castro's penis, or his erectile dysfunction. Ruben C. Castro was to return to Dana A. Ohl, MD., after the diagnostic studies were done.

Ruben C. Castro is a 45 year old, who has suffered and continues to suffer numbness of his penis, pain of his penis, and erectile dysfunction, since February 9, 2011, which is well beyond the usual return of sensation, elimination of pain, and erectile dysfunction. He no longer has the ability to have an erection, and without question he has suffered permanent damage to his reproductive organ resulting in his inability to procreate.

2. Applicable Standard of Care

You owed to Ruben C. Castro the duty of due care, and the duty to exercise that degree of reasonable care, diligence, learning, judgment, and skill of other specialists in the field of orthopedics, urology, and internal medicines measured against the local and national standards of care.

The accepted method of practice is to inform the patient regarding any and all procedures, which are to be performed during and regarding any operative procedure, including but not limited to the use of a perineal traction post, and the possible results thereof.

3. Manner in Which You Breached the Standard of Care

You were required to inform Ruben C. Castro regarding the entire procedure, which he underwent on February 9, 2011, including but not limited to the use of the perinea traction post, which can and did in this case cause injury to Ruben C. Castro's genitilia, as described above.

You should have monitored the time Ruben C. Castro was in traction with the use of the perineal traction post.

4. Action You Should Have Taken to Comply with the Standard of Care

You should have informed Ruben C. Castro of the possibilities of the injuries he suffered in your use of the perineal traction post during the debridement, which would have allowed Ruben C. Castro the opportunity not to proceed with the debridement procedure.

Prior to the time of the debridement of the left hip with the use of a perineal traction post you should have checked to make sure that the hospital staff, and the anesthesia personnel knew the possible injuries that can arise from the use of a perineal traction post, and the manner in which the same may be prevented.

5. Manner in Which the Breach of the Standard of Care Caused the Injuries

Ruben C. Castro claims injuries to his genitilia area more specifically the numbness of his penis, the pain therein, and the erectile dysfunction, on the failure to inform concerning the injuries a patient can receive from the use of a perineal traction post during lower extremity surgery, and the failure to take steps to be assured Ruben C. Castro would not be injured as a result of the use of the perineal traction post.

Christy Castro has suffered a loss of consortium, as a direct and proximate cause of the injuries suffered by Ruben C. Castro, her Husband.

6. Names of Other Receiving Notice in Relation to His Claim

The other named individuals are set forth on Page 1 hereof, and there are other ostensible agents or employees of the University of Michigan Health Services, who were involved in the treatment of Ruben C. Castro, the Claimant, and the Claimant's Wife.

NOTE: This Notice is to be furnished to each person, entity, business, or health care facility that you reasonably believe might be encompassed in this claim.

Dated: August 25, 2011

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EXHIBIT E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO, and
CHRISTY CASTRO,
Jointly and Severally,
Plaintiffs

v.

Case No. 13-138-NH
HON: DAVID S. SWARTZ

JAMES ALAN GOULET, M.D.,
JAMES ALAN GOULET, M.D.,
P.C., and STEPHEN R. TOLHURST,
M.D. Jointly and Severally,
Defendants. /

JAMES D. WINES (P22436)
Attorney for Plaintiffs
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(734) 996-2722 Fax No. (734) 996-0128/

Statement Pursuant to MCR 2.113(C)(2)(a)

There is no other pending or resolved Civil Action arising out of the transaction, or occurrence alleged in the Complaint.

Dated: February 4, 2013.

JAMES D. WINES (P22436)
Attorney for Plaintiffs.

COMPLAINT WITH MOTION PURSUANT TO MCL 600.2912d(2)
WITH NOTICE OF HEARING THEREFORE ATTACHED

NOW COME RUBEN CASTRO, and CHRISTY CASTRO, his Wife, the Plaintiffs herein, Jointly and Severally, by and through their Attorney, **JAMES D. WINES**, and in support of the claims of the Plaintiffs set forth in the following 'Complaint' state as follows:

1. The Plaintiffs herein claim damages in this Civil Action pursuant to **MCL 600.1483(1)(c), MCL 600.1483(2), (3), and (4).**

2. The amount in controversy exceeds Twenty-Five Thousand ($25,000.00) Dollars, and both venue and jurisdiction rest in this Circuit Court.

3. That at all times material hereto **RUBEN CASTRO**, and **CHRISTY CASTRO**, his Wife, the Plaintiffs herein, were residents of Milan, Michigan.

4. That this cause of action arose in the City of Ann Arbor, County of Washtenaw, State of Michigan.

5. That at all times material to the claims of the Plaintiffs the Defendants routinely and systematically conducted the practice of medicine, as Medical Doctors, in the City of Ann Arbor, County of Washtenaw, State of Michigan.

6. That at all times set forth herein below the Plaintiffs maintained a physician / patient relationship with **JAMES ALAN GOULET, M.D., JAMES ALAN GOULET, M.D., P.C., and STEPHEN R. TOLHURST, M.D.,** the Defendants herein.

7. That prior to the surgical procedure neither **JAMES ALAN GOULET, M. D.,** nor **STEPHEN R. TOLHURST M.D.**, the Defendants herein, informed **RUBEN CASTRO**, a Plaintiff herein, that a possible negative side effect of the surgery to be performed using a perineal traction post was and is erectile dysfunction.

8. That on, or about February 9, 2011, **JAMES ALAN GOULET, M.D., and STEPHEN R. TOLHURST. M.D.,** the Defendants herein, took **RUBEN CASTRO**, one of the Plaintiffs herein, to an operating room at the University of Michigan Hospital for a surgical procedure, a left hip arthroscopy with labral debridement, and intra-articular synovectomy using a perineal traction post.

9. That **RUBEN CASTRO**, a Plaintiff herein, on February 9, 2011, was 44 years of age, and did not have erectile dysfunction.

10. That **RUBEN CASTRO**, a Plaintiff herein, on February 9, 2011, was induced with a general anesthesia at the University of Michigan Hospital, and the record in existence at that time described **RUBEN CASTRO**, a Plaintiff herein, as being 5 feet 5 inches tall, and 126.5 pounds.

11. That during the performance of the procedure, the operative notes evidence the anesthesia at 7:30 AM, the incision at 8:33 AM, with the termination of the procedure at 10:38 AM, a period of three [3] hours and eight [8] minutes.

12. The distraction forces were applied in an excessive manner, and for an excessive period of time causing **RUBEN CASTRO,** a Plaintiff herein, to suffer nerve damage resulting erectile dysfunction.

13. **RUBEN CASTRO**, a Plaintiff herein, prior to being discharged from the University of Michigan Hospital reported decreased sensation in his penis to light touch over the majority of the bilateral sides thereof, and pain when urinating.

14. **RUBEN CASTRO**, a Plaintiff herein, was referred to Dana A. Ohi, M.D., a Professor of Urology at the University of Michigan Health Care System, due to his erectile dysfunction..

15. Dana A. Ohi, M. D., believed there had been excessive pressure encountered during the procedure using the perineal traction post, and the numbness of **RUBEN CASTRO'S** penis was similar to that seen in competitive bicyclists from their time of sitting on bicycle seats in practice and competition..

16. On or about March 22, 2011, **RUBEN CASTRO**, a Plaintiff herein, had a follow-up appointment with **JAMES ALAN GOULET, M. D.**, a Defendant herein, and during the appointment the staff persons in attendance with **JAMES ALAN GOULET, M. D.**, discussed the possibility there had been intraoperative pressure on the nerves, while addressing the issue of the postoperative swelling, the numbness of **RUBEN CASTRO'S**, a Plaintiff herein, penis, and the inability of his penis to be stimulated. (Erectile Dysfunction).

17. On or about June 1, 2011, **RUBEN CASTRO**, a Plaintiff herein, had a follow-up appointment with Dana A. Ohi, M. D., who recognized his continuing numbness of his penis, erectile dysfunction, noting there was a firmness of the penis on examination, but no erection.

18. Believing **RUBIN CASTRO'S**, a Plaintiff herein, problem was a nerve injury, he was sent to the Physical Medicine Electrodiagnostic Group to perform nerve conduction velocities to determine the problem.

19. Dana A. Ohi, M. D., also prescribed Cialis for **RUBEN CASTRO**, a Plaintiff herein, which made no difference his inability to have an erection, and change the numbness of his penis. (Erectile Dysfunction.).

20. Dana A. Ohi, M. D., referred **RUBEN CASTRO** to Associates in Physical Medicine & Rehabilitation, P. C., and on July 29, 2011, he saw Jon M. Wardner, M.D., at said facility.

21. The purpose of **RUBEN CASTRO'S**, a Plaintiff herein, appointment with Associates in Physical Medicine & Rehabilitation, P. C., was to perform an electrodiagnostic examination of the his left lower extremity due to his reports of

chronic penile numbness, and inability to have a erection.

22. **RUBEN CASTRO** went forward with a study of the dorsal nerve of the penis, and the same resulted in an inability to record a consistent response, there was a small amplitude response seen twice with a latency of 3.1 milliseconds, but was present in only two [2] of the ten [10] stimulations.

23. **RUBEN CASTRO**, a Plaintiff herein, now 45 years of age continues to suffer erectile dysfunction denying him the ability to procreate, which commenced on February 9, 2011, the date of the surgical procedure directly caused by the Defendants herein use of the perineal traction post using excessive pressure, and employing the same for a period in excessive of two [2] hours both being contrary to the standard of practice.

COUNT I. PROFESSIONAL NEGLIGENCE

24. **RUBEN CASTRO,** and **CHRISTY CASTRO,** the Plaintiff herein, incorporates by reference Paragraphs '1' through '23' set forth above, as if the same were specifically reiterated herein.

25. **RUBEN CASTRO,** and **CHRISTY CASTRO**, the Plaintiffs herein, did by implication and expression rely upon the Defendants herein to do that which was necessary and proper, and was in accordance therewith to invoke the generally accepted standards of care.

26. The Defendants herein jointly and severally owed a duty to **RUBEN CASTRO**, and **CHRISTY CASTRO**, the Plaintiffs herein, to adhere to all

applicable and appropriate standards of medical care and treatment, and had a duty to be competent to deliver patient care, ordinarily obtainable at other similarly situated facilities within the general community, and to use due and reasonable care and diligence in the exercise of those duties in furtherance of the care and treatment rendered to **RUBEN CASTRO,** a Plaintiff herein.

27. The Defendants herein jointly and severally, were negligent in the care and treatment rendered to **RUBEN CASTRO,** a Plaintiff herein, by their disregard of the duties and obligations owed to **RUBEN CASTRO**, a Plaintiff herein, and thereby deviated from good and acceptable standards of medical care and treatment in the following particulars:

(a) By failing to warn **RUBEN CASTRO,** a Plaintiff herein, of the possible negative side effect of the surgical procedure using a perinea traction post causing erectile dysfunction prior to subjecting **RUBEN CASTRO**, a Plaintiff herein, to the surgical procedure;

(b) By applying excessive distraction forces in excess of two [2] hours without releasing the same from time to time;

(c) By the failing to convert to a limited open exposure surgery and/or open exposure surgery at or about two [2] hours of distraction time;

(d) By the application of distraction forces in excess of the range of forces documented to be usual, safe and routine, and barring appropriate distraction with application of such forces, failure to perform the procedure by limited open technique; and

(e) The Plaintiffs herein reserve the right to amend Plaintiffs'

Complaint to set forth further deviations from the generally accepted standards of medical care as will be disclosed during the discovery process.

28. That if **RUBEN CASTRO**, a Plaintiff herein, had been informed a possible negative side effect of the use of a perineal traction post during the operative procedure was erectile dysfunction he would have declined the surgical procedure the Defendants herein were going to cause him to undergo, and in fact **RUBEN CASTRO,** a Plaintiff herein, underwent.

COUNT II - LOSS OF CONSORTIUM

29. The Plaintiffs herein incorporate by reference Paragraphs '1' through '28' set forth above, as ifthe same were reiterated herein.

30. **CHRISTY CASTRO**, a Plaintiff herein, has lost the services of **RUBEN CASTRO**, the other Plaintiff herein, as her husband, due to the fact he now has erectile dysfunction caused by the above described failures, and negligence of the Defendants herein.

31. **CHRISTY CASTRO**, a Plaintiff herein, has suffered damages due to the loss off the services of **RUBEN CASTRO,** the other Plaintiff herein, and further he cannot procreate.

WHEREFORE RUBEN CASTRO, and **CHRISTY CASTRO**, the Plaintiffs herein, respectfully request damages be found against the Defendants, jointly and severally, in excess of Twenty-Five Thousand ($25,000.00) Dollars in accordance with **MCL 1483(1)(c),** and **MCL 1483(2), (3),** and **(4)** in whatever

form and amount to which this Honorable Court, as the trier of fact deems them to be entitled provided such damages are full, fair and just compensation reflecting the actual harms and losses sustained, together with costs, interest, and Attorney fees so wrongfully sustained.

Dated: February 4, 2013.

JAMES D. WINES (P22436)
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Ann Arbor, MI., 48113-0478
(734) 996-2722 Fax (734) 996-0126

EXHIBIT F

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO, and
CHRISTY CASTRO,
Jointly and Severally,
Plaintiffs

v.

Case No. 13-138-NH
HON: _____

JAMES ALAN GOULET, M.D.,
JAMES ALAN GOULET, M.D.,
P.C., and STEPHEN R. TOLHURST,
M.D. Jointly and Severally,
Defendants. /

JAMES D. WINES (P22436)
Attorney for Plaintiffs
P.O. Box 130478
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(734) 996-2722 Fax No. (734) 996-0128/

PLAINTIFFS' MOTION TO EXTEND TIME FOR FILING OF AFFIDAVIT OF MERIT 28 DAYS PURSUANT TO MCL 600.2912d(2)

NOW COME THE PLAINTIFFS HEREIN by and through their Attorney, **JAMES D. WINES**, and respectfully request a 28 day extension of time for the filing of the 'Affidavit of Merit' as provided in **MCL 600.2912d(2),** and in support thereof states as follows:

1. **MCL 600.2912d(2)** provides as follows:

"Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1)."

2. The Plaintiffs herein have retained Ryan Nunley, D. D., who is located

at the Washington University School of Medicine, Department of Orthopedic Surgery, 660 South Euclid Ave., St. Louis, MO., after the Plaintiffs' herein had contacted possible Expert Witnesses to find they did not perform, or no longer performed lower extremity surgeries, did not perform, or no longer performed lower extremity surgeries using a perinea traction post, or had a conflict, or would be uncomfortable as an Expert Witness, since they knew, or served with James Alan Goulet, M. D., a Defendant herein, on some Board, and lastly the surgery occurred at the University of Michigan Hospial.

2. Dr. Nunley was referred to the Plaintiffs' Attorney on January 16, 2013, by Thomson Reuters Expert Witness Services, a Division of Thomson Reuters, which the Attorney for the Plaintiffs turned having had no success in locating an Expert, who would qualify as an Expert Witness, and performed lower extremity surgeries using a perineal traction post, as did the Defendants in this medical malpractice action.

3. Dr. Nunley was retained on January 18, 2013, and the 'Notice of Intention', and the records regarding **RUBEN CASTRO**, a Plaintiff herein, surgery on February 9, 2011, were sent to him via Overnight Mail on January 18, 2013, which he received on January 19, 2013.

4. It has also just been discovered by the Plaintiffs' Attorney herein that Dr. Nunley is also an Expert Witness in the medical malpractice action for the Plaintiff in Jared Kuzich v. James Alan Goulet M. D., James Alan Goulet, M. D., P. C., and Stephen R. Tolhurst, Case No. 11-701-NH, in this Circuit Court in which the facts and liability issues parallel this medical malpractice action

although the surgery occurred on November 5, 2008.

5. Dr. Nunley gave his oral Deposition Testimony in the Kuzich medical malpractice action on January 16, 2013.

6. Dr. Nunley is in the process of providing the 'Affidavit of Merit' for this medical malpractice action, however, it appears the same shall not be prepared until after February 8, 2013, due to his busy schedule as an Orthopedic Surgeon, although Plaintiffs' Attorney has been in constant telephone contact with Dr. Nunley's secretary, and has spoken via telephone on two [2] occasions directly with Dr. Nunley.

7. Although it may appear the filing of this medical malpractice action was held to the last possible time, it was not for the reason the Plaintiffs herein had been told by medical physicians **RUBEN CASTRO** has seen that erectile dysfunction which may occur from surgery in which a perineal traction post is utilized goes away, after weeks or months, however, **RUBEN CASTRO'S**, a Plaintiff herein, erectile dysfunction has not gone away, and he still suffers from erectile dysfunction just short of two [2] years from the date of the surgery on February 9, 2011.

WHEREFORE RUBEN CASTRO and CHRISTY CASTRO, the Plaintiffs herein, through their Attorney, **JAMES D. WINES,** respectfully request an Order be entered allowing an additional 28 days for the filing of the 'Affidavit of Merit' from the date of the filing of this Action, as provided, and permitted under **MCL 600.2912d(2).**

"I declare the statements set forth above are true to the best of my knowledge, information and belief.'

Dated: February 4, 2013.

JAMES D. WINES (P22436)
Attorney for Plaintiffs
P. O. Box 130478
Ann Arbor, MI., 48113-0478
(734) 996-2722 Fax (734) 996-0128

NOTICE OF HEARING

The foregoing Motion shall be heard by the Honorable DAVID J. SWARTZ the Circuit Judge assigned to this Action in his Courtroom on WEDNESDAY, 02/20/2013, ~~2013~~, at 1:30PM, or as soon after as the Parties may be heard.

Dated: February 4, 2013.

JAMES D. WINES (P22436)
Attorney for Plaintiffs.

EXHIBIT G

COPY

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO, and
CHRISTY CASTRO,
Jointly and Severally,
Plaintiffs

v.

Case No. 13-138-NH
HON: DAVID S. SWARTZ

JAMES ALAN GOULET, M.D.,
JAMES ALAN GOULET, M.D.,
P.C., and STEPHEN R. TOLHURST,
M.D. Jointly and Severally,
Defendants. /

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DANIEL J. FERRIS (P69633)
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(313) 961-0200 Fax No. (313) 961-0388
pmclaim@kerr-russell.com
dferris@kerr-russell.com /

AFFIDAVIT OF MERIT FROM RYAN M. NUNLEY, M. D.

Attached hereto please find the "Affidavit of Merit' from Ryan M. Nunley, M. D. for the above captioned Medical Malpractice Action.

Dated: February 25, 2013.

JAMES D. WINES (P22436)
Attorney for Plaintiff.

CERTIFICATE OF SERVICE

I herein and hereby certify that I served a copy of then foregoing 'Affidavit of Merit upon opposing Counsel via Fax (313) 961-0388 on this 25th day of February, 2013.

Dated: February 25, 2013.

JAMES D. WINES (P22436)
Attorney for Plaintiff.

Affidavit of Merit

STATE OF MISSOURI)
)ss:
COUNTY OF St. Louis)

Your Affiant, Ryan M. Nunley, M.D., being first duly sworn deposes, and says as follows:

1. I am an Orthopedic Surgeon certified by the American Board of Orthopedic Surgery.

2. For the period in excess of one [1] year prior to the allegations of medical malpractice set forth herein, I devoted a majority of my professional time to the active clinical practice of Orthopedic Surgery.

3. I have reviewed the Plaintiff's Notice of Intent to File a Claim Pursuant to MCL 600.2912B by Ruben Castro, and Christy Castro, His Wife', dated August 25, 2011, and all medical records supplied to me by Plaintiff's Attorney in the matter of Castro, et. al. v. Goulet, et. al.

4. The Defendants were required under the prevailing standard of care to Inform Ruben Castro as to the risk of perineal nerve damage, numbness of his penis / erectile dysfunction, resulting from the surgical procedure Ruben Castro was to undergo using a perineal traction post .

5. As the operating surgeons who participated in the February 9, 2011, surgical procedure, James Alan Goulet, MD., and Stephen R. Tolhurst, MD., should have under the prevailing standard of practice to inform Ruben Castro of the possibility of numbness of his penis, erectile dysfunction, occurring as a result of the surgical procedure using a perineal traction post.

6. The Affiant believes, if Ruben Castro had been informed of the risk of the resulting numbness of his penis, erectile dysfunction, occurring as a result of surgery using a perineal traction post he would have declined to undergo the surgerical procedure.

7. The opinion expressed in this Affidavit are based upon documents and materials referred to in this Affidavit are subject to modification based upon additional information which might be provided..

Ryan M. Nunley, MD.

Subscribed and sworn to before
me on this 25th of February, 2013.
_____, Notary Public

SHERYL J WUNDERLICH
Notary Public - Notary Seal
Comm. Number 13671911
STATE OF MISSOURI
St. Louis County
My Commission Expires: Feb. 24, 2017

Seal

Sending Confirm

Date : FEB-25-2013 MON 11:53AM
Name :
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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO, and
CHRISTY CASTRO,
Jointly and Severally,
Plaintiffs

v.

Case No. 13-138-NH
HON: DAVID S. SWARTZ

JAMES ALAN GOULET, M.D.,
JAMES ALAN GOULET, M.D.,
P.C., and STEPHEN R. TOLHURST,
M.D. Jointly and Severally,
Defendants. /

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pmclain@kerr-russell.com
dferris@kerr-russell.com /

AFFIDAVIT OF MERIT FROM RYAN M. NUNLEY, M. D.

Attached hereto please find the "Affidavit of Merit" from Ryan M. Nunley, M. D. for the above captioned Medical Malpractice Action.

Dated: February 25, 2013.

JAMES D. WINES (P22436)
Attorney for Plaintiff.

EXHIBIT H

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO and KRISTY CASTRO,

Plaintiffs,

v Case No. 13-138-NH

JAMES ALAN GOULET, M.D. and
JAMES ALAN GOULET, M.D.,

Defendants./

MOTION HEARING

BEFORE THE HONORABLE DAVID S. SWARTZ

Ann Arbor, Michigan - Wednesday, February 27, 2013

APPEARANCES:

For the Plaintiff: JAMES D. WINES (P22436)
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Ann Arbor, Michigan

Wednesday, February 27, 2013 - 1:39 p.m.

* * * * * *

THE COURT: Number 23 on the docket, Castro versus Goulet, 13-138-NH.

MR. WINES: Yes, Your Honor. James D. Wines appearing for and on behalf of the plaintiff.

This is our motion to extend -- do you want to put your appearance now?

MR. McLAIN: I can do that now. Patrick McLain for defendant.

MR. WINES: Your Honor, this is our motion to extend the time for filing the Affidavit of Merit as set forth in the attached motion to the complaint. In the interim, of course, there has been an answer and a response, but most importantly the Affidavit of Merit was obtained and it was served on the 25th of February to the defendants and filed in this Court on the 26th.

Now, this case is a uniformed or uninformed consent, however you want to call it, case. And, the actual statute we -- I do not believe runs on February ninth because of the fact that this information never really came to the plaintiff from Dr. Goulet until March the 11th. That was mentioned in the notice of intent and it was also answered by stating very simply in their

response that they had no duty to inform him of the possibilities of the risks.

So, we are asking that this Court allow that extension which would no longer be 28 days, it would just be extended for the period -- since we filed it on the fourth, 28 days would be March the second, and we've complied with that previous to that.

The reason we didn't file it is they kept saying it will go away, it will go away, it will go away, and it hasn't gone away.

THE COURT: Okay.

MR. WINES: So, that's where we are right now.

THE COURT: Thank you.

MR. McLAIN: Your Honor, the -- this is a medical malpractice action. The statute of limitations for a medical malpractice is what it is. The Legislature said that the complaint for malpractice must be accompanied by an Affidavit of Merit. Everybody knows that, that's as basic as it gets.

Upon a showing of good cause, this Legislature said, that the plaintiff could ask the Court for a 28 day extension of the deadline to file the Affidavit of Merit. That requirement in the -- in the statute of good cause must mean something or else it means that the statute of limitations is two years and 28 days. There has to be a

showing of good cause.

If there was some legitimate problem with this my client would not put the Court through the exercise of evaluating good cause. But, in this case it is obvious that there is no good cause and we are duty-bound to come here and tell you that and show why that is.

The motion to extend which was attached to the complaint said to the Court the reason we couldn't do it sooner is that we were referred to this expert, Dr. Nunley (ph), on January 16th, 2013, by a service. The motion further said to the Court we contacted this expert, Dr. Nunley, on January 18th. On January 19th we sent him the stuff, we're waiting to hear back from him, he's busy. That was the motion. That's the supposed good cause.

Judge, we knew, we the defense, reading that knew that was demonstrably not correct and we have shown you why that is. We have attached to our complaint the pertinent pages -- the -- we attached to our response to the motion the pertinent pages to show that.

On that morning, January 16, 2013, by coincidence, on that very day, January 16, 2013, I personally was in Dr. Nunley's office in St. Louis taking his deposition in another case. My client, Dr. Goulet, is the defendant in that other case. He was there with me. The two of us are sitting in the expert's office before

nine in the morning, before eight in the morning, in St. Louis deposing him. And, this case came up, have you Mr. -- Dr. Nunley, have you ever been consulted by a lawyer in Michigan about a different case? Answer, yes. This lawyer named Jim Wines called me. This is Dr. Nunley's testimony that very morning. When did he call you? He called me last week. What did he tell you? Well, he had this case and he wanted me to look at it. Dr. Nunley also said that he had been contacted four months before by someone, not Mr. Wines, about that same case.

Judge, it's not correct that he was referred to Dr. Nunley by a service on the 16th and couldn't get the Affidavit out on time. He told you something that was demonstrably wrong. He's caught. There is no good cause.

Now, if the legislative requirement of good cause doesn't mean anything then grant his motion and let him do it. But, if it means -- there must be a showing of good cause and it's clearly not here. This motion should be denied. He's late. He's had this case for two years. He didn't -- he knew he had to file an Affidavit of Merit, he didn't, he procrastinated. You can give -- you have -- you could give him a break if you want to but it's not justified. It's clear what happened here.

THE COURT: Thank you.

Mr. Wines?

MR. WINES: Well, again, I -- I've set forth what we were doing and we did in fact retain the expert as he suggested. Of course, sitting in his office at 9:00 on January 16th, of course you deal through his people which is a woman named L-O-T-Z, Lotz.

But, in any event, it has been given. We think, again, because the information from Dr. Goulet really didn't occur until March 11th, it really doesn't mean anything in this case and I think the Court should allow that extension because certainly there's no prejudice or harm shown to the judge -- or to the doctor.

THE COURT: The Court will give the benefit of the doubt to the plaintiff in this case and for the reasons argued I'll grant your motion.

MR. WINES: I'll prepare an order, Your Honor. Thank you.

(At 1:46 p.m., proceeding concluded.)

* * * * * *

STATE OF MICHIGAN)
COUNTY OF WASHTENAW)ss.

I certify that this transcript consisting of 8 pages is a true and accurate transcription to the best of my ability of the proceeding in this case before the Honorable David S. Swartz, as recorded by the clerk.

Proceedings were recorded and provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceeding or for the content of the recording provided.

Dated: September 11, 2013

Sandra Traskos, CER 7118

EXHIBIT I

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO and CHRISTY CASTRO,
Jointly and severally,

Plaintiff,

v

JAMES ALAN GOULET, M.D., JAMES ALAN GOULET, M.D. P.C., and STEPHEN R. TOLHURST, M.D., jointly and severally,

Defendants.

Case No. 13-138-NH

Honorable David S. Swartz

/

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DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO EXTEND TIME FOR FILING OF AFFIDAVIT OF MERIT 28 DAYS PURSUANT TO MCL 600.2912(d)(2)

Plaintiff's Motion should be denied. His attorney has had more than enough time to arrange for an Affidavit of Merit, and misrepresents the circumstances under which he sought to retain Ryan Nunley, M.D.

Plaintiff's Attorney Procrastinated

1. Plaintiff retained his attorney prior to August 25, 2011. On that date present counsel sent a Notice of Intent on behalf of his client. See Exhibit A.

2. Plaintiff's counsel has been free to file this action since February 25, 2012, and has known for much longer that an Affidavit of Merit must accompany a medical malpractice complaint. MCL 600.2912d.

3. On November 10, 2011, Vicki Young, who investigated this case on behalf of the University of Michigan Health System, first spoke with plaintiff's counsel about his case. Mr. Wines told Ms. Young that his experts, whom he did not name, were critical of the treatment in certain ways. Ms. Young promised to investigate his contentions and get back to him after an internal review committee in the Health System assessed whether the case has merit.

4. On January 12, 2012, Ms. Young spoke again with attorney Wines. She said the internal review found that the plaintiff's medical treatment met the standard of care. She also pointed Mr. Wines to three notes in plaintiff's medical records that show Mr. Castro had erectile dysfunction before Dr. Goulet treated him. Yet plaintiff claims Dr. Goulet caused his erectile dysfunction.

5. Mr. Wines and Ms. Young had follow up conversations about the issues in the case on January 29, 2012 (a Sunday) and March 23, 2012. On that latter date Mr. Wines said that he was in the process of getting an expert or additional expert.

6. On May 1, 2012, Ms. Young spoke with attorney Wines again, telling him that an additional defense external expert reviewer supported Dr. Goulet's care and treatment.

7. On May 4, 2012, Ms. Young spoke with attorney Wines, promising to speak with him the following week after receiving the final opinion from the University's newest expert.

8. On May 11, 2012, Ms. Young spoke with attorney Wines for the last time. She told him that the University had thoroughly reviewed and vetted the care given by Dr. Goulet, and was committed to his defense. Mr. Wines told her that he would be filing suit. Ms. Young informed him that any future contact would be with Dr, Goulet's defense counsel. See Exhibit B, Affidavit of Vicki E. Young.

9. Mr. Wines has long known that the University regards his case as without merit, and that he will have to file suit to obtain a recovery for his client. (Exhibit C, Response to Notice of Intent dated January 26, 2012). On April 14, 2012 he threatened to start suit within 20 days. (Exhibit D, Wines letter to Young, April 14, 2012.) Filing suit requires an Affidavit of Merit.

The Statements in Plaintiff's Attorney's Motion Cannot Be Reconciled with the Testimony of Dr. Nunley

10. The motion contends that:

- Mr. Wines was referred to Dr. Nunley by an expert witness service on January 16, 2013;
- Mr. Wines retained Dr. Nunley on January 18, 2013;
- Mr. Wines overnighted the medical records and Notice of Intent to Dr. Nunley on January 18, 2013 for receipt on January 19, 2013; and
- Dr. Nunley is supposedly too busy to sign an Affidavit of Merit.

11. On January 16, 2013, Dr. Nunley gave his deposition in a different case, *Jared Kuzich v James Goulet, M.D., et al,* Case No. 11-701-NH. Undersigned defense counsel represents Dr. Goulet in both cases. Dr. Nunley testified as follows:

Q. (By Mr. McLain) When did you last consult with Jim Wines?

A. He happened to call me last week.

Q. What's your understanding of the Jim Wines case?

A. That they have not filed anything. He wants me to review the records for another nerve injury case.

Q. Did you agree to do that?

A. I told him I would look at the records.

Q. *This is not a case you had seen before?*

A. *No.*

Q. *He just called you last week?*

A. ***I had been contacted maybe 4 or 5 months ago about it and told him the – somebody who asked if I would review it, and I said yes, but I never got anything, and then he called out of the blue last week.***

Q. *The person who called you before was someone other than Jim Wines?*

A. *Correct.*

Q. *Have you actually seen the records in that case yet?*

A. *No, only a summary.*

See Exhibit E, page 36, lines 2-25, of the deposition of Ryan Nunley, M.D. in *Kuzich v Goulet.*

Legal Discussion

The legislature permitted the Court to extend the deadline for filing the Affidavit of Merit required by MCL 600.2912(d)(2) for 30 days upon a showing of good cause.

The requirement of "good cause" has to mean something. If it is meaningless, it amounts to a de facto extension of the statute of limitations by 30 days.

Mr. Wines entered the fray before August 25, 2001. He let at least a year and a half pass by. **He tells the Court he was referred to Dr. Nunley on January 16, 2013 by an expert witness referral service. Dr. Nunley testified that same morning, before 9 AM, that he had been called by Mr. Wines the week before, and by another person on the same case "maybe 4 or 5 months ago."**

This isn't good cause. This is procrastination.

The University of Michigan did nothing to lead plaintiff's counsel to believe a settlement was possible. He should have filed this case a long time ago.

Under these circumstances, extending the deadline is inappropriate. Good cause has not been shown.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

By: _____

Patrick McLain (P25458)
Daniel J. Ferris (P69633)
Attorneys for Defendant
500 Woodward Avenue, Suite 2500
Detroit, Michigan 48226
313-961-0200
313-961-0388 - facsimile

Dated: February 15, 2013

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO and CHRISTY CASTRO,
Jointly and severally,

Plaintiff,

v.

Case No. 13-138-NH

Honorable David S. Swartz

JAMES ALAN GOULET, M.D., JAMES ALAN GOULET, M.D. P.C., and STEPHEN R. TOLHURST, M.D., jointly and severally,

Defendants.

/

JAMES D. WINES (P22436)
Attorney for Plaintiffs
P.O. Box 130478
Ann Arbor, Michigan 48113-0478
734-996-2722

PATRICK McLAIN (P25458)
DANIEL J. FERRIS (P69633)
KERR, RUSSELL AND WEBER, PLC
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dferris@kerr-russell.com

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

DEBORA R. ROTTMAN, being first duly sworn, deposes and says that she is employed by the law firm of **KERR, RUSSELL AND WEBER, PLC**, attorneys for Defendants, that on February 15, 2013, she deposited in the U.S. Mails, postage pre-paid, copies of Defendants' Response to Plaintiff's Motion to Extend Time for Filing of Affidavit of Merit 28 days Pursuant to MCL 600.2912(d)(2) and Proof of Service, which envelope was addressed to: James D. Wines, P.O. Box 13078, Ann Arbor, Michigan 48113-0478.

Further deponent saith not.

Debora R. Rottman

Subscribed and sworn to before me
February 15, 2013

Angela E. Hincks
Notary Public, Wayne County, Michigan

ANGELA E. HINCKS
Notary Public, Wayne County, MI
My Commission Expires April 10, 2013
Acting in the County of Wayne

NOTICE OF INTENTION TO FILE A CLAIM PURSUANT TO MCL 600.2912B;
BY RUBEN C. CASTRO, AND CHRISTY CASTRO, HIS WIFE

TO: Potential Defendants:

UNIVERSITY of MICHIGAN HEALTH SYSTEMS ✓
University of Michigan Hospital - Risk Management
1500 E. Medical Center Dr.
Ann Arbor, MI., 48109

JAMES L. GOULET, MD., Professor
University of Michigan Orthopedics
1500 East Medical Center Dr., 2ND Floor, TC 2912
Ann Arbor, MI., 48109

STEPHEN R. TOLHURST, MD. , Fellow
1500 East Medical Center Dr.
Ann Arbor, MI. 48109

DAVID RUTA, MD., Resident Physician
1500 East Medical Dr.
Ann Arbor, MI., 48109

JOE THOMAS KOFOED, MD., Resident Physician
1500 East Medical Dr.
Ann Arbor, MI., 48109

1. Factual Basis of Claim

Ruben C. Castro had been developing left hip pain, and was referred over by Jennifer Doble, MD., to James L. Goulet, MD, and Orthopedic Surgeon at the University of Michigan Health Systems. James L. Goulet, MD., had Ruben C. Castro undergo a left diagnostic hip injection from which he got dramatic relief. James L. Goulet, MD., also had Ruben C. Castro undergo a CT Scan.

Thereafter James L. Goulet, MD., offered Ruben C. Castro a left diagnostic hip arthroscopy, and possible debridement thereof. In doing so James L. Goulet, MD., did not make mention of possible neurological complications (injury), nor did any other employee of the University of Michigan Health Services make any mention of possible neurological complications (injury) arising from the use of the perinea traction post, including but not limited to resulting perineal nerve palsy, numbness of the penis, erectile dysfunction, and/or haematoma. Ruben C. Castro denied any numbness, paresthesias, or weakness.

On February 9, 2010, Ruben C. Castro, was taken to the operating room, and underwent a diagnostic left hip arthroscopy with labral debridement, and

intra-articular synovectomy by James L. Goulet, MD. During the course of the operative procedure a perineal traction post was utilized as well as a Smith and Nephew padded traction boots. It is alleged care was taken to pad all bony prominences and cutaneous nerves. Ruben C. Castro's right lower extremity was placed in the well leg contra lateral traction boots, and the left leg was placed in the ipsilateral traction system with the leg in abduction, traction was applied, and the leg adducted and the foot internally rotated. Fluoroscopy confirmed excellent distraction of the joint to approximately 8 millimeters. The left lower extremity was prepped and draped. Kefzol was administered.

Arthroscopy was initiated using a proximal anterolateral arthroscopy portal. It was placed at the junction of the tensor fascia lata and gluteus medius. This was the labrum. A modified anterior portal was subsequently established, and anterior partal established with a spinal needle without implication entering at this junction of the capsule and the labrum. The camera was moved to the modified anterior portal, and using a heaver blade, an intraportal capsulotomy was completed, extending the cut interiorly to the level of the psoas tendon. An inflamed hemorrhagic synovitis both on the extra capsular and intracapsular sides were noted. Using a curved shaver, these edges were derided to stable margins. The anterosuperior labral tear was noted, and was derided back to a stable rim.

Examination of the chondral surfaces reveled no significant degenerative changes. The ligament teres was intact. The psoas tendon was without inflammation or tenosynovitis warranting a release. The femoral head cartilage was intact, with no evidence of femoral head dysmorphic changes.

All bony debris was removed, and a thorough synovectomy was performed. The was no evidence of instability.

On February 9, 2011, James L. Goulet, MD., reported Ruben C. Castro was without intra-op complications, and had tolerated the procedures well. Ruben C. Castro was transferred to surgical observation in stable condition for overnight post-op pain management.

Ruben C. Castro reported decreased sensation in his penis to light touch over the majority of bilateral sides thereof prior to being discharged from the University of Michigan Hospital on February 10, 2010.

Ruben C. Castro was 'consulted out' to Dana A. Ohl, MD., a Professor of Urology at the University of Michigan Hospital, and on February 24, 2011, noted since the surgical procedure Ruben C. Castro had complained of penis numbness after the surgery, as well as pain when urinating. Dana A. Ohl, MD., stated most likely there was pressure encountered to the perineum caused by the usage of the perineal traction post regardless of the multiple precautions with padding alleged to have been taken by James L. Goulet, MD, and the OR team.

There had been excessive pressure encountered in the perineum. Dana A. Ohl, MD., further described the numbness of Ruben C. Castro's penis was very similar of what is seen in competitive bicyclists from their use of a bicycle seat, which is similar to the post seen in the Orthopedic Surgery Suite. Dana Ohl, MD., stated individuals who have perineal pressure symptoms the same are resolved within several weeks of the cessation of using the bicycle seat. However, the fact of the matter is 6 ½ months have passed, since the surgical procedure, and Ruben C. Castro continues to suffer numbness in his p*enis, and* is without the ability of his penis to be stimulated (erectile dysfunction). Sensation has not returned, his pain continues, and his erectile dysfunction also continues, after the use of the perineal traction post during surgery.

On March 22, 2011, in a follow up appointment with James L. Goulet, MD., Ruben C. Castro had many questions regarding the numbness, and pain he was experiencing in his penis with the staff attending James L. Goulet, MD. Approximately 15 or 20 minutes was spent with the staff attending James L. Goulet, MD., discussing the situation, the possibilities of its occurrence including intraoperative pressure on nerves and addressing this issue of postoperative swelling. James L. Goulet stated he had discussed Ruben C. Castro's numbness of his penis with Dana A. Ohl, MD., regarding the belief there would be a return of sensation within the next few months, and that Ruben C. Castro would follow up with Urology regarding these urological issues.

On June 1, 2011, in a followup Dana A. Ohl, MD., recognized Ruben C. Castro's continuing numbness of his penis, and erectile dysfunction noting there was a firmness of the penis upon examination. Dana A. Ohl, MD., assumed that his condition was a nerve injury, and Ruben C. Castro was being sent to the Physical Medicine Electrodiagnostic Group to perform a nerve conduction velocities to determine what was going on with Ruben C. Castro. Dana A. Ohl, MD., stated is was a possibility there would be Doppler Studies as well.

Dana A. Ohl, MD., also put Ruben C. Castro on Cialis, however, the same has not made a difference in the numbness of Ruben C. Castro's penis, or his erectile dysfunction. Ruben C. Castro was to return to Dana A. Ohl, MD., after the diagnostic studies were done.

Ruben C. Castro is a 45 year old, who has suffered and continues to suffer numbness of his penis, pain of his penis, and erectile dysfunction, since February 9, 2011, which is well beyond the usual return of sensation, elimination of pain, and erectile dysfunction. He no longer has the ability to have an erection, and without question he has suffered permanent damage to his reproductive organ resulting in his inability to procreate.

2. Applicable Standard of Care

You owed to Ruben C. Castro the duty of due care, and the duty to exercise that degree of reasonable care, diligence, learning, judgment, and skill of other specialists in the field of orthopedics, urology, and internal medicines measured against the local and national standards of care.

The accepted method of practice is to inform the patient regarding any and all procedures, which are to be performed during and regarding any operative procedure, including but not limited to the use of a perineal traction post, and the possible results thereof.

3. Manner in Which You Breached the Standard of Care

You were required to inform Ruben C. Castro regarding the entire procedure, which he underwent on February 9, 2011, including but not limited to the use of the perinea traction post, which can and did in this case cause injury to Ruben C. Castro's genitilia, as described above.

You should have monitored the time Ruben C. Castro was in traction with the use of the perineal traction post.

4. Action You Should Have Taken to Comply with the Standard of Care

You should have informed Ruben C. Castro of the possibilities of the injuries he suffered in your use of the perineal traction post during the debridement, which would have allowed Ruben C. Castro the opportunity not to proceed with the debridement procedure.

Prior to the time of the debridement of the left hip with the use of a perineal traction post you should have checked to make sure that the hospital staff, and the anesthesia personnel knew the possible injuries that can arise from the use of a perineal traction post, and the manner in which the same may be prevented.

5. Manner in Which the Breach of the Standard of Care Caused the Injuries

Ruben C. Castro claims injuries to his genitilia area more specifically the numbness of his penis, the pain therein, and the erectile dysfunction, on the failure to inform concerning the injuries a patient can receive from the use of a perineal traction post during lower extremity surgery, and the failure to take steps to be assured Ruben C. Castro would not be injured as a result of the use of the perineal traction post.

Christy Castro has suffered a loss of consortium, as a direct and proximate cause of the injuries suffered by Ruben C. Castro, her Husband.

6. Names of Other Receiving Notice in Relation to His Claim

The other named individuals are set forth on Page 1 hereof, and there are other ostensible agents or employees of the University of Michigan Health Services, who were involved in the treatment of Ruben C. Castro, the Claimant, and the Claimant's Wife.

NOTE: This Notice is to be furnished to each person, entity, business, or health care facility that you reasonably believe might be encompassed in this claim.

Dated: August 25, 2011

JAMES D. WINES (P22436)
Attorney for Claimants
P. O. Box 130478
Ann Arbor, MI., 48113-0478
(734) 996-2722
Fax No. (734) 996-0128

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO and CHRISTY CASTRO,
Jointly and severally,

Plaintiff,

v.

JAMES ALAN GOULET, M.D., JAMES ALAN GOULET, M.D. P.C., and STEPHEN R. TOLHURST, M.D., jointly and severally,

Defendants.

Case No. 13-138-NH

Honorable David S. Swartz

/

JAMES D. WINES (P22436)
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DANIEL J. FERRIS (P69633)
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pmclain@kerr-russell.com
dferris@kerr-russell.com

AFFIDAVIT OF VICKI E. YOUNG

STATE OF MICHIGAN)
)SS
COUNTY OF WASHTENAW)

My name is Vicki E. Young.

I have been employed by the University of Michigan Health System since 2004.

Among my duties are to investigate pending malpractice claims.

I make this Affidavit in support of Defendants' Response to Plaintiff's Motion to Extend Time to File Affidavit of Merit 28 Days Pursuant To MCL 600.2912(d)(2).

After Mr. Wines filed his NOI on behalf of Ruben Castro, I investigated the claim.

B

Defense counsel's description of my conversations with Mr. Wines is accurate.

VICKI E. YOUNG

Subscribed and sworn to before me this
14th day of February, 2013

Notary Public, Washtenaw County, Mich.

My Commission expires: August 19, 2015

January 26, 2012

James D. Wines Attorney at Law
2254 Georgetown Blvd.
Ann Arbor, MI 48105

RE: Ruben Castro

Dear Mr. Wines:

Please find attached the response to the plaintiff's notice of intent. If you have any questions, please don't hesitate to contact us.

Thank you,

Nancy C. Schneider

NCS/tms
Attachment
Cc: Vicki Young

RESPONSE TO PLAINTIFF'S NOTICE OF INTENT TO FILE CLAIM ON BEHALF OF THE REGENTS OF THE UNIVERSITY OF MICHIGAN, JAMES GOULET, MD, STEPHEN TOLHURST, MD, DAVID RUTA, MD, AND JOE THOMAS KOFOED, MD

This Response is sent on behalf of The Regents of the University of Michigan, James Goulet, MD, Stephen Tolhurst, MD, David Ruta, MD, and Joe Thomas Kofoed, MD. By responding to this notice, no legal defenses, factual defenses, or objections to form or service have been waived.

A. FACTUAL BASIS FOR DEFENSE OF CLAIM

Ruben Castro (DOB 4/20/66) was involved in a motor vehicle accident in January of 2004, which resulted in a closed head injury, abdominal injuries, and a crushed pelvis. He underwent a number of procedures to address his injuries, including multiple abdominal surgeries, and left hip and pelvis surgery (open reduction with internal fixation). In the years leading up to the events at issue, Mr. Castro had issues with erectile dysfunction, hypogonadism, chronic pain, depression, ongoing memory problems, and anxiety.

In the Fall of 2010, Mr. Castro was referred to UMHS orthopedic surgeon James Goulet, MD for evaluation of limited range of motion and pain in the hips. Mr. Castro was seen by Dr. Goulet on 11/9/10, and reported constant pain in his left hip, which he described as occasionally sharp and stabbing, and other times, throbbing. On exam, he had minimal pain that was reproduced with flexion of the left hip and passive internal rotation. X-rays showed no evidence of hardware complication, and no new fractures. Dr. Goulet recommended Mr. Castro undergo a CT scan of the left hip to further evaluate the joint, and to also have Marcaine hip injection at the next clinic visit. On 11/23/10, Mr. Castro underwent hip injection, and afterward reported his hip felt profoundly improved, and that he had no pain. Dr. Goulet noted, *"Given response he had to his injection, we recommend surgical intervention in the form of a diagnostic hip arthroscopy to evaluate for any labral pathology or any hardware in the joint."*

On 1/21/11, Mr. Castro presented for a preoperative history and physical, at which time details of the proposed surgery were discussed. It was documented, *"He is offered a left hip arthroscopy by Dr. Goulet and would like to proceed with this. Risks and benefits are explained to the patient. He displayed understanding."* Also on this date, Mr. Castro signed a consent form for left hip arthroscopy, and possible labral debridement; this form stated, in part, *"My risks include: Pain/discomfort;...damage to any adjacent structures (nerves, vessels, tissue)..."*

Dr. Goulet performed hip surgery on 2/9/11. He was assisted by Stephen Tolhurst, MD (resident). Mr. Castro was reasonably padded and positioned in preparation for the surgery. Reasonable and appropriate precautions were taken to assure undue pressure would not be exerted in the perineal area. The perineal post was heavily padded with foam. Mr. Castro was slid down to the post, with care taken to ensure his testicles and penis were not crushed. Per the operative note, the risks and benefits of the procedure were again reviewed with Mr. Castro, and care was taken with regard to padding:

"...We have recommended diagnostic arthroscopy, with anticipated repair/debridement of the acetabular labrum. Risks and benefits of surgical intervention were reviewed, and informed consent was obtained...

Mr. Castro was seen in the preoperative area and the left hip marked with an indelible marker. After informed consent was again reviewed, he was subsequently brought to the operating room...Care was taken to pad all bony prominences and cutaneous nerves. A perineal traction post was utilized as well as Smith and Nephew padded traction boots. The right lower extremity was placed in the well leg contralateral traction holder. The left leg was placed in the ipsilateral traction system. With the leg in abduction, traction was applied, and the leg adducted and the foot internally rotated. Fluoroscopy confirmed excellent distraction of the joint to approximately 8 millimeters..."

Intraoperatively, an inflamed hemorrhagic synovitis was noted and debrided to stable margins. A labral tear was also noted and debrided. Mr. Castro was brought back to the recovery room, with no apparent complications. The total case was just over two hours long, with the traction time less than the time from incision to surgical dressing.

Postoperatively, Mr. Castro reported decreased sensation to light touch over the sides of his penis, and urinary retention. He was discharged home on 2/10/11 (David Ruta, MD was the resident physician listed on the discharge summary). At that time, he reported ease of urination, and improvement in his penile sensation.

Mr. Castro called the UMHS orthopedic surgery clinic on 2/11/11. He reported he could not get an erection, but that he had been able to immediately after surgery in the PACU. He was referred to Urology, and the Urology clinic contacted him to schedule an appointment.

Mr. Castro presented to the Urology clinic on 2/24/11, and refused to be seen by a female provider. As a result, Dana Ohl, MD, made accommodations to see Mr. Castro that day. Dr. Ohl noted Mr. Castro complained of penile numbness and pain when urinating since the surgery. Mr. Castro underwent Rigiscan testing to examine erectile activity. Dr. Ohl documented the patient had one erection, with minimal rigidity. Dr. Ohl observed that while multiple precautions with padding were undertaken to assure undue pressure would not be exerted in the perineal area, he surmised that pressure was nevertheless encountered in the perineum, perhaps due to Mr. Castro's thin frame (height 65 inches, weight 129). Dr. Ohl noted that Mr. Castro's description of numbness was similar to that seen with competitive bicyclists, and that those individuals' perineal pressure symptoms typically resolve within several weeks of cessation of the activity. Dr. Ohl was confident Mr. Castro's penile sensitivity would return with time.

Mr. Castro was also seen in follow up by Dr. Goulet on 2/24/11. Dr. Goulet noted decreased sensation in his penis, but normal sensation in his scrotum and groin. His left hip pain had improved. He was ambulatory, fully weight bearing, and felt that the surgery was successful with some of the pain in his left hip.

In March of 2011, Mr. Castro was seen by his internist (Dr. Kwok), and wanted to restart his testosterone injections for hypogonadism, which had been stopped due to the surgery. Dr. Kwok restarted the testosterone injections.

On 6/1/11, Mr. Castro was seen in follow up by Dr. Ohl. On exam, Dr. Ohl noted a firmness of Mr. Castro's penis. Dr. Ohl recommended nerve conduction velocities, and also prescribed Cialis.

In July of 2011, Mr. Castro reported new hip weakness, pain, and gait abnormality, and was referred for an EMG of the left lower extremity to rule out radiculopathy. The EMG was performed 7/29/11, at which time both the left lower extremity and his penis were studied. Sensory and motor NCS of the left lower extremity were normal, and there was no electrodiagnostic evidence of active or ongoing radiculopathy or plexopathy. On electrodiagnostic study of the dorsal nerve of the penis, the examiner noted he was unable to record a consistent response, but a small amplitude response was seen. Overall, the study was deemed difficult to interpret in isolation.

Mr. Castro has since returned to the UMHS for testosterone injections, and other care. The notes for the visits between August and November of 2011 make no mention of issues with penile numbness. As of 11/8/11, he noted an improvement in energy with testosterone, and stated that he was doing fairly well.

B. THE APPLICABLE STANDARD OF CARE

The standard of care applicable to James Goulet, MD was that of a physician board certified in orthopedic surgery, providing care under the same or similar circumstances.

The standard of care applicable to Stephen Tolhurst, MD was that of a fifth year orthopedic surgery resident, providing care under the same or similar circumstances.

The standard of care applicable to David Ruta, MD was that of a third year orthopedic surgery resident, providing care under the same or similar circumstances. Dr. Ruta was not involved in the 2/9/11 surgery, or the preoperative contacts with Mr. Castro, and as such, was not involved in the events that are the subject of claimant's Notice of Intent.

The standard of care applicable to Joe Thomas Kofoed, MD was that of an emergency medicine resident on rotation in orthopedic surgery, providing care under the same or similar circumstances. Dr. Kofoed was not involved in the 2/9/11 surgery or the preoperative contacts with Mr. Castro, and as such, was not involved in the events that are the subject of claimant's Notice of Intent.

The standard of care applicable to The University of Michigan Health System was that of an academic medical center in Michigan providing health care under the same or similar circumstances.

C. COMPLIANCE WITH THE APPLICABLE STANDARD OF PRACTICE

The care provided to Mr. Castro by these Respondents in all respects conformed to the applicable standard of practice. The NOI claims Mr. Castro should have been informed of the use of the perineal traction post, and

that it can cause injury to Mr. Castro's genitalia. The standard of care did not require the caregivers to specifically convey this information to Mr. Castro in advance of the 2/9/11 surgery. Further, there is no reasonable indication that had this risk been specifically covered preoperatively, that Mr. Castro would not have gone forward with the surgery. Assuming Mr. Castro has neuropraxia secondary to his surgery, this is a very rare (unreported) complication of hip arthroscopy. Still, the potential for nerve injury with any type of surgery is present, as reflected on the consent form Mr. Castro signed. Reasonable precautions were taken to guard against perineal pressure and potential nerve injury. The perineal post was reasonably padded, and the patient's testicles were protected. The time frame Mr. Castro was in traction was reasonable and within the standard of care.

D. THE ALLEGED NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE ALLEGED INJURY.

The injuries claimed in the Notice of Intent to File Claim were not the proximate result of the alleged failure to comply with the applicable standard of practice. Mr. Castro did not suffer injury as a result of any violation of the standard of care on the part of these Respondents. Given Mr. Castro's pre-existing history, and the unusual nature of his complaints, it is not certain Mr. Castro's complaints are secondary to padding or positioning during the 2/9/11 surgery.

RICHARD C. BOOTHMAN
Chief Risk Officer
University of Michigan Health System

Dated: January 26, 2012

PROOF OF SERVICE

Nancy C. Schneider certifies that a copy of the foregoing instrument was faxed and mailed upon the attorney(s) of record of all parties to the above cause by mailing the same to them at their respective business addresses as disclosed by the pleadings of record herein, with postage fully prepaid thereon on January 26, 2012 and by faxing the same to them at their respective fax numbers on January 26, 2012.

NANCY C. SCHNEIDER

JAMES D. WINES, J.D., ESQ. P22436

April 14, 2012

Vicki Young, RN, BSN
Healthcare Risk Management
300 North Ingalls, Room 8AD6
Ann Arbor, MI., 48109-0478

Fax No. (734) 763-5300

RE: Claim of Ruben Castro

Dear Ms. Young:

I believe the following three [3] page Article from 'The Journal of Arthroscopic and Related Surgery, Vol. 21, No. 1 (January) 2007, pp. 107.el - 107.e3 establishes there has been a safer technique for hip distraction in existence at least since January, 2007, to eliminate the use of the inherently dangerous Perineal Post for said procedures.

Ruben Castro was not only not informed of the known dangers to patients arising from the use of a Perineal Post, but he was not informed of the existence of hip arthroscopy without the use of a Perneal Post.

It was my understanding after your receipt of my last letter dated February 2, 2012, with its attached articles you summoned another medical person for consultation. I have not heard anything regarding the very important failure to warn issue contrary to the standards.

Please advise within the next twenty [20] days, or it shall be necessary to proceed with the filing and service of a Medical Malpractice Suit against those claimed against by Ruben Castro.

Very truly yours.

James D. Wines

cc: Ruben Castro

P.O. Box 130478, Ann Arbor, MI., 48113-0478 Off. No. (734) 996-2722 Fax No. (734) 996-0128
Admitted to State Bar of Michigan December 30, 1965

D

KUZICH v. GOULET, M.D., ET AL

RYAN M. NUNLEY, M.D.

January 16, 2013

Prepared for you by

BIENENSTOCK
NATIONWIDE COURT REPORTING & VIDEO

Bingham Farms/Southfield • Grand Rapids
Ann Arbor • Detroit • Flint • Jackson • Lansing • Mt. Clemens • Saginaw

E

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WASHTENAW

JARED KUZICH,
Plaintiff,
vs.
JAMES ALAN GOULET, M.D., JAMES ALAN GOULET, M.D., P.C. and STEPHEN R. TOLHURST, M.D., jointly and severally,
Defendants.
JARED KUZICH,
Plaintiff,
vs.
BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, UNIVERSITY OF MICHIGAN HEALTH SYSTEMS, UNIVERSITY OF MICHIGAN) HOSPITALS, and UNIVERSITY HEALTH SERVICE,
Defendants.

Case No. 11-701-NH
Honorable Timothy P. Connors

DEPOSITION OF RYAN M. NUNLEY, M.D.
Taken on behalf of the Defendants
January 16, 2013
(Starting time of the deposition: 7:30 a.m.)

INDEX OF EXAMINATION

INDEX OF EXHIBITS

(The original exhibits were retained by Mr. McLain.)

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WASHTENAW

JARED KUZICH,
Plaintiff,
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JAMES ALAN GOULET, M.D., JAMES ALAN GOULET, M.D., P.C. and STEPHEN R. TOLHURST, M.D., jointly and severally,
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BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, UNIVERSITY OF MICHIGAN HEALTH SYSTEMS, UNIVERSITY OF MICHIGAN) HOSPITALS, and UNIVERSITY HEALTH SERVICE,
Defendants.

Case No. 11-701-NH
Honorable Timothy P. Connors

DEPOSITION OF WITNESS, RYAN M. NUNLEY, M.D., produced, sworn, and examined on the 16th day of January, 2013, between the hours of nine o'clock in the forenoon and six o'clock in the evening of that day, at the offices of Barnes-Jewish Hospital Plaza, West Pavilion, 11th Floor, Suite 11300, St. Louis, Missouri, before BRENDA ORSBORN, a Certified Court Reporter within and for the State of Missouri, in a certain cause now pending in the State of Michigan, in Circuit Court for the County of Washtenaw, wherein Jared Kuzich is the Plaintiff and James Alan Goulet, M.D., et al. are the Defendants.

APPEARANCES

For the Plaintiff:
Mr. Gregory M. Bereznoff
812 S. Main Street, Suite 230
Royal Oaks, Michigan 48067
(248) 543-1920
gblaw1@aol.com

For the Defendants:
Mr. Patrick McLain
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Detroit, Michigan 48226
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The Court Reporter:
Ms. Brenda Orsborn, RPR/CSR/CCR
Missouri CCR No. 914
Illinois CSR No. 084-003460

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Q. However, SEAK does offer to its member expert witnesses various services; isn't that true?
A. I'm not sure what you're referring to.
Q. Well, they have meetings. They have seminars. They have --
A. I've seen some e-mails like that, but I've never done any of those.
Q. This is like many other organizations that a doctor or a lawyer gets communications from, correct?
A. Correct.
Q. And if you wanted to, you could react to them and go to meetings and go to presentations and buy their publications or not. It's up to you?
A. Correct.
Q. And you have never been to a SEAK presentation or seminar or professional meeting?
A. Yes.
Q. Yes, you have, or no, you haven't?
A. No, I was answering yes. You said "You have never," so --
Q. I'm trying to make sure we're communicating.
A. I have never been to one of those.
Q. Okay. How do you evaluate whether your $395 is well spent, given that the attorney contacting you in any given case is just contacting you and may or

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may not have come from this source?
MR. BEREZNOFF: Form and foundation.
A. I don't -- I don't know. I mean, I guess it's just a personal decision.
Q. (By Mr. McLain) Do you have reason to believe that your $395 is well spent, that you're getting referrals?
MR. BEREZNOFF: Form and foundation.
A. There are some other of our faculty members who have done it and said it's a good way, and so that's how I got involved with it.
Q. (By Mr. McLain) Okay. So your elders and betters told you it was a productive endeavor?
A. Correct.
Q. And so you just took their advice?
A. Correct.
Q. Whether it is or not, you're not sure?
A. Correct.
Q. Have you ever testified in a State of Michigan lawsuit before this one?
A. Testify as in a trial?
Q. Or a deposition.
A. I don't believe I've done a Michigan deposition.
Q. Is this the first Michigan case that you

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recall reviewing?
A. No. I have another, at least one -- no, two other Michigan cases.
Q. That are pending now --
A. Correct.
Q. -- in which no testimony has been given by you?
A. Correct.
Q. Are those cases in which the plaintiff's attorney is consulting you as opposed to the defendant's attorney?
A. Both of those are plaintiffs.
Q. Are they Bereznoff cases, or are they non-Bereznoff cases?
A. Both non-Bereznoff.
Q. Do you remember the names of the Michigan lawyers who consulted you in those two other cases?
A. Mike Gagleard. I think it's G-A-G-L-E-A-R-D.
Q. Okay.
A. And then Jim Wines about another hip scope case. Wines as in wine with an "S."
MR. BEREZNOFF: If I may interject, Doctor. If you did give another name, I missed it.
THE WITNESS: Jim Wines.

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MR. BEREZNOFF: Thank you.
Q. (By Mr. McLain) When did you last consult with Jim Wines?
A. He happened to call me last week.
Q. What's your understanding of the status of the Jim Wines case?
A. That they have not filed anything. He wants me to review the records for another nerve injury case.
Q. Did you agree to do that?
A. I told him I would look at the records.
Q. This is not a case you had seen before?
A. No.
Q. He just called you last week?
A. I had been contacted maybe four or five months ago about it and told him the -- somebody who asked if I would review it, and I said yes, but I never got anything, and then he called out of the blue last week.
Q. The person who called you before was someone other than Jim Wines?
A. Correct.
Q. Have you actually seen the records in that case yet?
A. No, only a summary.

EXHIBIT J

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO, and
CHRISTY CASTRO,
Jointly and Severally,
Plaintiffs

v.

Case No. 13-138-NH
HON: DAVID S. SWARTZ

JAMES ALAN GOULET, M.D.,
JAMES ALAN GOULET, M.D.,
P.C.,
Defendant. /

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dferris@kerr-russell.com /

FIRST AMENDED COMPLAINT

NOW COME RUBEN CASTRO, and CHRISTY CASTRO, his Wife, the Plaintiffs, by and through their Attorney, **JAMES D. WINES**, and in support of the claims of the Plaintiffs set forth in the following 'First Amended Complaint' state as follows:

1. The Plaintiffs herein claim damages in this Civil Action pursuant to **MCL 600.1483(1)(c), MCL 600.1483(2), (3), and (4).**

traction post would be used.

9. That **RUBEN CASTRO**, a Plaintiff herein, on February 9, 2011, was 44 years of age, and did not have any erectile dysfunction, had an active in sex life, and had fathered two [2] children, whose birth dates are January 2, 2003, and June 6, 2006, with the other Plaintiff herein.

10. That **RUBEN CASTRO**, a Plaintiff herein, on February 9, 2011, was induced with a general anesthesia at the University of Michigan Hospital, and the record in existence at that time described **RUBEN CASTRO**, a Plaintiff herein, as being 5 feet 5 inches tall, and 126.5 pounds.

11. That during the performance of the procedure, the operative notes evidence the anesthesia at 7:30 AM, the incision at 8:33 AM, with the termination of the procedure at 10:38 AM, a period of three [3] hours and eight [8] minutes.

12. Distraction forces were applied to **RUBEN CASTRO**, a Plaintiff herein, during the above described surgical procedure.

13. **RUBEN CASTRO**, a Plaintiff herein, prior to being discharged from the University of Michigan Hospital reported decreased sensation in his penis to light touch over the majority of the bilateral sides thereof, and pain when urinating.

14. **RUBEN CASTRO**, a Plaintiff herein, was referred to Dana A. Ohi, M.D., a Professor of Urology at the University of Michigan Health Care System, due to his resulting erectile dysfunction after the above described surgical procedure.

15. Dana A. Ohi, M. D., opinioned there had been excessive pressure

encountered during the procedure using the perineal traction post, and described the numbness of **RUBEN CASTRO'S** penis as being similar to that seen in competitive bicyclists caused by their time of sitting on bicycle seats in practice and competition..

16. On or about March 22, 2011, **RUBEN CASTRO**, a Plaintiff herein, had a follow-up appointment with **JAMES ALAN GOULET, M. D.,** the Defendant herein, at which staff persons on the Defendant's staff were in attendance with **JAMES ALAN GOULET, M. D.,** who among themselves discussed the possibility there had been intraoperative pressure on the nerves, while addressing the issue of the postoperative swelling, the numbness of **RUBEN CASTRO'S**, a Plaintiff herein, penis, and the inability of his penis to be stimulated. (Erectile Dysfunction).

17. Prior to said follow-up appointment on, or about March 22, 2011, **JAMES ALAN GOULET, M. D.,** the Defendant herein, had never informed **RUBEN CASTRO**, a Plaintiff herein, regarding the possibility of any negative side effects, including but not limited to the risk of erectile dysfunction contrary to the standard of care.

18. On or about June 1, 2011, **RUBEN CASTRO**, a Plaintiff herein, had a follow-up appointment with Dana A. Ohi, M. D., who recognized his continuing numbness of his penis, erectile dysfunction, noting there was a firmness of the penis on examination, but no erection.

19. Believing **RUBIN CASTRO'S**, a Plaintiff herein, problem was a nerve injury, he was referred to the Physical Medicine Electrodiagnostic Group for the

purpose of performing nerve conduction velocities to determine the problem.

20. Dana A. Ohi, M. D., also prescribed Cialis for **RUBEN CASTRO**, a Plaintiff herein, which there was no difference his inability to have an erection, and the numbness of his penis continued without change. (Erectile Dysfunction.).

21. Dana A. Ohi, M. D., referred **RUBEN CASTRO** to Associates in Physical Medicine & Rehabilitation, P. C., and on July 29, 2011, he saw Jon M. Wardner, M.D., at said facility.

22. The purpose of **RUBEN CASTRO'S**, a Plaintiff herein, appointment with Associates in Physical Medicine & Rehabilitation, P. C., was for him to undergo an electrodiagnostic examination of his left lower extremity due to his reports of chronic penile numbness, and inability to have a erection.

23. **RUBEN CASTRO** went forward with a study of the dorsal nerve of the penis, and the same resulted in an inability to record a consistent response, there was a small amplitude response seen twice with a latency of 3.1 milliseconds, but was present in only two [2] of the ten [10] stimulations.

24. **RUBEN CASTRO**, a Plaintiff herein, now 45 years of age continues to suffer erectile dysfunction denying him the ability to procreate, which never was the case prior to February 9, 2011, the date of the above described surgical procedure, and had **RUBEN CASTRO** been informed by **JAMES ALAN GOULET, M.D.** the Defendant herein,, as required under the standard of care, prior to the above described surgical procedure that a possible negative side effect, and risk was erectile dysfunction he would have refused to undergo the above described surgical procedure.

COUNT I. PROFESSIONAL NEGLIGENCE

25. **RUBEN CASTRO,** and **CHRISTY CASTRO,** the Plaintiff herein, incorporates by reference Paragraphs '1' through '24' set forth above, as if the same were specifically reiterated herein.

26. **RUBEN CASTRO,** and **CHRISTY CASTRO**, the Plaintiffs herein, did rely, and give uninformed consent to the above described surgical procedure based upon **JAMES ALAN GOULET'S, M. D.,** the Defendant herein, failure to warn of the possible negative side effect and risk of erectile dysfunction, and had said warning been given, as required under the standard of medical care, **RUBEN CASTRO** would have not undergone the surgical procedure.

27. The Defendant herein owed a duty to **RUBEN CASTRO**, and **CHRISTY CASTRO**, the Plaintiffs herein, to adhere to all applicable and appropriate standards of medical care and treatment, including but not limited to informing them of the possible negative side effect of numbness of the penis, and failure of being to have an erection. (Erectile Dysfunction.).

28. The Defendant herein was negligent in the care and treatment rendered to **RUBEN CASTRO,** a Plaintiff herein, by his disregard of the duties and obligations owed to **RUBEN CASTRO**, a Plaintiff herein, and thereby deviated from good and acceptable standards of medical care and treatment in the following particulars:

(a) By failing to inform **RUBEN CASTRO,** a Plaintiff herein, of the

possible negative side effect of the above described surgical procedure using a perineal traction post causing erectile dysfunction prior to subjecting **RUBEN CASTRO**, a Plaintiff herein, to the surgical procedure;

(b) By applying excessive distraction forces in excess of two [2] hours without releasing the same from time to time;

(c) By the failing to convert to a limited open exposure surgery and/or open exposure surgery at or about two [2] hours of distraction time;

(d) By the application of distraction forces in excess of the range of forces documented to be usual, safe and routine, and barring appropriate distraction with application of such forces, failure to perform the procedure by limited open technique; and

(e) The Plaintiffs herein reserve the right to further amend Plaintiffs' Complaint to set forth further deviations from the generally accepted standards of medical care as will be disclosed during the discovery process.

29. Again had **RUBEN CASTRO**, a Plaintiff herein, been informed of the possible negative side effect of the use of a perineal traction post during the above described operative procedure was erectile dysfunction he would have declined the surgical procedure the Defendant herein was going to cause him to undergo, and in fact **RUBEN CASTRO,** a Plaintiff herein, underwent giving uninformed consent to his loss and detriment, as well as the loss and detriment of his Wife.

COUNT II - LOSS OF CONSORTIUM

30. The Plaintiffs herein incorporate by reference Paragraphs '1' through '29' set forth above, as if the same were reiterated herein.

31. **CHRISTY CASTRO**, a Plaintiff herein, has lost the services of **RUBEN CASTRO**, the other Plaintiff herein, as her husband, due to the fact he now has erectile dysfunction caused by the above described failures, and negligence of the Defendants herein.

32. **CHRISTY CASTRO**, a Plaintiff herein, has suffered damages due to the loss off the services of **RUBEN CASTRO**, the other Plaintiff herein, and further he cannot procreate.

WHEREFORE RUBEN CASTRO, and **CHRISTY CASTRO**, the Plaintiffs herein, respectfully request Judgment, and an award of damages be found against **JAMES ALAN GOULET, M. D.**, the Defendant, in excess of Twenty-Five Thousand ($25,000.00) Dollars in accordance with **MCL 1483(1)(c)**, and **MCL 1483(2), (3),** and **(4)** and in an amount to which this Honorable Court, as the trier of fact deems them to be entitled provided such damages are full, fair and justly compensate each of the Plaintiffs herein reflecting the actual suffering, harms and losses sustained, together with costs, interest, and Attorney fees so wrongfully sustained.

Dated: March 8, 2013.

JAMES D. WINES (P22436)
Attorney for Plaintiffs herein.

COPY

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO, and
CHRISTY CASTRO,
Jointly and Severally,
Plaintiffs

v.

Case No. 13-138-NH
HON: DAVID S. SWARTZ

JAMES ALAN GOULET, M.D.,
JAMES ALAN GOULET, M.D.,
P.C., and STEPHEN R. TOLHURST,
M.D. Jointly and Severally,
Defendants. /

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dferris@kerr-russell.com /

AFFIDAVIT OF MERIT FROM RYAN M. NUNLEY, M. D.

Attached hereto please find the "Affidavit of Merit' from Ryan M. Nunley, M. D. for the above captioned Medical Malpractice Action.

Dated: February 25, 2013.

JAMES D. WINES (P22436)
Attorney for Plaintiff.

CERTIFICATE OF SERVICE

I herein and hereby certify that I served a copy of then foregoing 'Affidavit of Merit upon opposing Counsel via Fax (313) 961-0388 on this 25th day of February, 2013.

Dated: February 25, 2013.

JAMES D. WINES (P22436)
Attorney for Plaintiff.

Affidavit of Merit

STATE OF MISSOURI)
)ss:
COUNTY OF St. Louis)

Your Affiant, Ryan M. Nunley, M.D., being first duly sworn deposes, and says as follows:

1. I am an Orthopedic Surgeon certified by the American Board of Orthopedic Surgery.

2. For the period in excess of one [1] year prior to the allegations of medical malpractice set forth herein, I devoted a majority of my professional time to the active clinical practice of Orthopedic Surgery.

3. I have reviewed the Plaintiff's Notice of Intent to File a Claim Pursuant to MCL 600.2912B by Ruben Castro, and Christy Castro, His Wife', dated August 25, 2011, and all medical records supplied to me by Plaintiff's Attorney in the matter of Castro, et. al. v. Goulet, et. al.

4. The Defendants were required under the prevailing standard of care to Inform Ruben Castro as to the risk of perineal nerve damage, numbness of his penis / erectile dysfunction, resulting from the surgical procedure Ruben Castro was to undergo using a perineal traction post .

5. As the operating surgeons who participated in the February 9, 2011, surgical procedure, James Alan Goulet, MD., and Stephen R. Tolhurst, MD., should have under the prevailing standard of practice to inform Ruben Castro of the possibility of numbness of his penis, erectile dysfunction, occurring as a result of the surgical procedure using a perineal traction post.

6. The Affiant believes, if Ruben Castro had been informed of the risk of the resulting numbness of his penis, erectile dysfunction, occurring as a result of surgery using a perineal traction post he would have declined to undergo the surgerical procedure.

7. The opinion expressed in this Affidavit are based upon documents and materials referred to in this Affidavit are subject to modification based upon additional information which might be provided..

Ryan M. Nunley, MD.

Subscribed and sworn to before
me on this 25th of February, 2013.
_____, Notary Public

SHERYL J WUNDERLICH
Notary Public - Notary Seal
Comm. Number 13671911
STATE OF MISSOURI
St. Louis County
My Commission Expires: Feb. 24, 2017

Seal

Sending Confirm

Date : FEB-25-2013 MON 11:53AM
Name :
Tel. :

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO, and
CHRISTY CASTRO,
Jointly and Severally,
Plaintiffs

v.

Case No. 13-138-NH
HON: DAVID S. SWARTZ

JAMES ALAN GOULET, M.D.,
JAMES ALAN GOULET, M.D.,
P.C., and STEPHEN R. TOLHURST,
M.D. Jointly and Severally,
Defendants. /

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AFFIDAVIT OF MERIT FROM RYAN M. NUNLEY, M. D.

Attached hereto please find the "Affidavit of Merit" from Ryan M. Nunley, M. D. for the above captioned Medical Malpractice Action.

Dated: February 25, 2013.

JAMES D. WINES (P22436)
Attorney for Plaintiff.

Certificate of Service

I herein and hereby certify that I served a copy of then foregoing 'First Amended Complaint' with a copy of the previously filed 'Affidavit of Merit' attached thereto upon **PATRICK McLAIN** of **Kerr, Russell, and Weber, P. C.**, the Attorneys of record for the Defendant herein at their above captioned address on this **8th day of March, 2013**, via First Class Mail with the postage prepaid, and my return address on the sealed envelope.

Dated: March 8, 2013.

JAMES D. WINES (P22436)
Attorney for Plaintiffs.

EXHIBIT K

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO and KRISTY CASTRO,

Plaintiffs,

v

Case No. 13-138-NH

JAMES ALAN GOULET, M.D. and
JAMES ALAN GOULET, M.D.,

Defendants./

MOTION FOR SUMMARY DISPOSITION HEARING

BEFORE THE HONORABLE DAVID S. SWARTZ

Ann Arbor, Michigan - Wednesday, May 8, 2013

APPEARANCES:

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Ann Arbor, Michigan

Wednesday, May 8, 2013 - 2:39 p.m.

* * * * * *

THE CLERK: Number 13 on the docket, Castro versus Goulet, 13-138-NH.

MR. WINES: Your Honor, James D. Wines for the plaintiff in this case.

MR. McLAIN: Good afternoon, Your Honor. Patrick McLain for defendant and moving party Dr. James Goulet.

This is a motion for summary disposition based on the expiration of the statute of limitations.

The plaintiff was -- the plaintiff is still alive and so -- and he's an adult so there's no complications with the statute of limitations. He was treated on February ninth of '11 and he sued on February four of '13, which is five days before two years. He did not attach an Affidavit of Merit but realizing his omission he did attach a motion for leave to extend the deadline for filing that Affidavit of Merit by a month. That motion was not heard before February ninth when the statute ran. Eventually it was heard and this Court granted it and the plaintiff did file his Affidavit of Merit.

Alas, the Barlett case, the published case in the Court of Appeals squarely says that it is not enough

to merely file a motion to extend before the statute runs. The filing of a motion to extend does not toll the statute, a court order extending it would. And, therefore, that case came out exactly wrong for the plaintiff.

There's a subsequent Court of Appeals case that says the same thing and two more after that that are unpublished that say the same thing. All with subtle variations of -- of the sequence of filing and affidavits and motions and so on.

The -- the core though is that the act of filing a motion does not toll the statute and entry of an order would. And, if you have to stand on your head to get an order entered that's what you have to do.

In the plaintiff's response it cites a case arguing that this Court has the power to equitably toll the statute of limitations. And, that case is Ward versus Rooney-Gandy. Unfortunately, that case was reversed by the Supreme Court and is bad law. The cite at which the Supreme Court reversed Ward is 474 Mich 917 in 2005.

Also in 2005 the Devillers decision of the Supreme Court, if it didn't entirely eviscerate the doctrine of equitable tolling it came awfully close and that doctrine clearly does not apply to this situation.

THE COURT: Mr. Wines?

MR. WINES: Your Honor, this is the second time we've been here. The first time this issue was not raised at all by the defendant. The interesting part about this when I read all these particular cases, they all have differences.

When you look at the statute itself which is 600.912d, and I will dispense with reading the boldface entitlement, it says section 2192d(1) is subject to subsection two. Subject means what it means. In other words, this subsection two for getting the additional 28 days cannot be defeated. What they are saying is if you don't think you can get the Affidavit of Merit in time then you file a motion. Well, that's all well and good but let's arbitrarily say that I file a motion 30 days in advance. The Court would be in its discretionary term or ability to simply say it's premature. If it were a week before it could say it's premature.

The way I read the statute is that 28 day limitation can extend the statute of limitations. And, in this particular case we did in fact file a motion to extend pursuant to the second section of that statute. We did notice it for hearing. Some of the cases, you will note, that he cites they didn't notice it for hearing. It was heard on February 27th. I had filed the Affidavit of Merit prior to that time but between the time of the

filing of the motion and complaint. And, then the order extending the 28 days was entered on March eighth, which makes everything occur within the 28 days.

And, when you look at it and they're talking about when you have two statutes in some cases you have to take the one that's more specific. But, here's -- here's the problem. If this statute is in fact subject to section two, section two allows the extension for good cause shown of 28 days. We've been here for that. And, when we were here and the order was granted by this Court, defense did not raise the issue they're raising today. So, basically they're going for the second bite of the apple.

That case that he stated that -- I will admit that in that one I did not know it was reserved by the Supreme Court and I do apologize to the Court.

One thing I want to get straight though in this record is there's a little footnote in his answer -- his response that says that I had contacted Dr. Nunley (ph) well in advance or words to that effect. Dr. Nunley's deposition was taken in another case which was K-U-Z-I-C-H, versus Goulet, which was case number 11-701-NH assigned to Judge Connors. In that particular scenario in his deposition, page 35 and 36, the questioner asks about me. And, it states, it says, he happened to call me last week.

What's your understanding of the statute of the case? That they have not filed anything. He wants me to review the records for another nerve injury case. Did you agree? I told him I would look at the records. That is the person that submitted the Affidavit of Merit. Then they go on to try and say well didn't somebody talk to you before and they said no it was not Mr. Wines. So, I want that clarified. I think we had discussed that previously in this record in this case.

So, I'm asking that the motion to dismiss on the basis of the statute of limitations be denied on the basis of the statute itself which specifically says section one is subject to section two.

THE COURT: Thank you.

MR. McLAIN: Just briefly, Your Honor, Mr. Wines' argument is not crazy or bizarre, it's just simply repugnant to Barlett and its progeny. It's been decided against him in four Court of Appeals cases.

As for the second bite of the apple, there -- he's somewhat correct about that. He filed this complaint five days before with a motion to extend and he claimed good cause and I got all involved in contesting the good cause, you heard my argument about that. You let him file it anyway. I am frank to tell you I didn't find this until I got into researching the case. And, I apologize

to Mr. Wines for that. I called him up and told him, I'm so sorry. If I had known this I wouldn't have put you through the --

THE COURT: Sure.

MR. McLAIN: -- dance over the -- over the good cause.

THE COURT: The relevant and material facts and timeframes are not disputed by the parties. Plaintiff filed a timely complaint for medical malpractice against defendant but failed to attach an Affidavit of Merit as required by the statute. Instead, prior to the expiration of the statute of limitations, plaintiff filed a proper motion to extend the time for filing an Affidavit of Merit pursuant to MCL 600.2912d(2). Although the Court granted the extension, the order was entered, and plaintiff filed the Affidavit of Merit after the period of limitations expired.

Defendant argues that because the order and the Affidavit of Merit were filed after the period of limitations expired, plaintiff's malpractice case is barred by the statute of limitations and the Court should dismiss the case with prejudice.

Plaintiff responds that the motion for extension of time to file the Affidavit of Merit was filed with the complaint and that the "notice of hearing occurred within

the 28 day extension period from February nine, 2013, the day in which the two year statute of limitations ran." Plaintiff argues that defendant relies on unpublished cases that are not binding on the Court and that, "judicial tolling" as approved in Bryant versus Oak Pointe Villa Nursing Center, 471 Mich 411, at 432, is applicable here to prevent unfairness to plaintiff and to serve the ends of justice.

Defendant responses that "judicial" or "equitable" tolling is no longer an available remedy. See Devillers versus Auto Club, 473 Mich 562, 593.

Further, "published decisions of the Court of Appeals make clear that plaintiffs' claims are time barred and the doctrine of equitable tolling is unavailable to plaintiff."

Recent published case law establishes that when a medical malpractice complaint is filed without an Affidavit of Merit it fails to toll the limitations period, and when the untolled period of limitations expires before the plaintiff files a complaint accompanied by an Affidavit of Merit, the case must be dismissed -- dismissed with prejudice on statute of limitation grounds, unquote. Ligons, L-I-G-O-N-S, versus Crittenton Hospital, 490 Michigan 61.

Existing case law construing the statutory

authority governing medical malpractice actions holds that the failure to timely file a complaint and an Affidavit of Merit will not toll the applicable limitations period, unquote. Scarsella versus Pollak, 461 Michigan 4 -- 547 and 550.

Although MCL 600.2 -- 2912d(2) provides an additional 28 days to file an Affidavit of Merit for good cause, the mere filing of a motion to extend the time for filing an Affidavit of Merit is insufficient to toll the statute of limitations. Barlett versus North Ottawa Community Hospital, 244 Mich App 685, pages 690 to 692.

It is the granting of a motion to extend the time for filing an Affidavit of Merit that tolls the period of limitation in a medical malpractice -- malpractice action, unquote. That is found at Barlett at pages 692 and 693.

In the present case plaintiffs filed a timely complaint along with a petition seeking an additional -- seeking a 28 day extension under 29.12d(2) in which to file their Affidavit of Merit. It is undisputed that the order granting plaintiffs' motion for 28 day extension of time was not signed until March eighth, 2013, well beyond the expiration of the period of limitations on February nine, 2013.

Because the order granting an extension of time

was not entered until after the extension -- after the expiration of the statute of limitations, the Court's actual grant of an extension of time did not occur until after the expiration of the statute of limitations and the order signed on March eight, 2013, did not toll the period of limitations. See Blackmon versus Genesys Regional Medical Center, Westlaw 462589, pages one and two.

MCL 600.2301 authorizes a court to "disregard" errors or defects in the proceedings only if it does not affect a party's substantial right. "The court in which an action or proceeding is pending has the power to amend any process, pleading, or proceeding in such action or proceeding either in form or substance for the furtherance of justice on the term -- on such terms as are just at any time before judgment rendered there in. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties."

Since the filing of a timely Affidavit of Merit affects defendant's substantial rights, the Court cannot disregard the defect or error. The Court agrees with defendants that given section 2301 the Court cannot apply judicial tolling.

For the reasons stated by defendant, defendant's motion for summary disposition is granted and plaintiffs'

complaint is dismissed with prejudice.

MR. McLAIN: Thank you, Your Honor.

THE COURT: You're welcome.

MR. WINES: Thank you.

(At 2:51 p.m., proceeding concluded.)

* * * * * *

STATE OF MICHIGAN)
COUNTY OF WASHTENAW)ss.

I certify that this transcript consisting of 13 pages is a true and accurate transcription to the best of my ability of the proceeding in this case before the Honorable David S. Swartz, as recorded by the clerk.

Proceedings were recorded and provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceeding or for the content of the recording provided.

Dated: September 11, 2013

Sandra Traskos, CER 7118

EXHIBIT L

RESPONSE TO PLAINTIFF'S NOTICE OF INTENT TO FILE CLAIM ON BEHALF OF THE REGENTS OF THE UNIVERSITY OF MICHIGAN, JAMES GOULET, MD, STEPHEN TOLHURST, MD, DAVID RUTA, MD, AND JOE THOMAS KOFOED, MD

This Response is sent on behalf of The Regents of the University of Michigan, James Goulet, MD, Stephen Tolhurst, MD, David Ruta, MD, and Joe Thomas Kofoed, MD. By responding to this notice, no legal defenses, factual defenses, or objections to form or service have been waived.

A. FACTUAL BASIS FOR DEFENSE OF CLAIM

Ruben Castro (DOB 4/20/66) was involved in a motor vehicle accident in January of 2004, which resulted in a closed head injury, abdominal injuries, and a crushed pelvis. He underwent a number of procedures to address his injuries, including multiple abdominal surgeries, and left hip and pelvis surgery (open reduction with internal fixation). In the years leading up to the events at issue, Mr. Castro had issues with erectile dysfunction, hypogonadism, chronic pain, depression, ongoing memory problems, and anxiety.

In the Fall of 2010, Mr. Castro was referred to UMHS orthopedic surgeon James Goulet, MD for evaluation of limited range of motion and pain in the hips. Mr. Castro was seen by Dr. Goulet on 11/9/10, and reported constant pain in his left hip, which he described as occasionally sharp and stabbing, and other times, throbbing. On exam, he had minimal pain that was reproduced with flexion of the left hip and passive internal rotation. X-rays showed no evidence of hardware complication, and no new fractures. Dr. Goulet recommended Mr. Castro undergo a CT scan of the left hip to further evaluate the joint, and to also have Marcaine hip injection at the next clinic visit. On 11/23/10, Mr. Castro underwent hip injection, and afterward reported his hip felt profoundly improved, and that he had no pain. Dr. Goulet noted, *"Given response he had to his injection, we recommend surgical intervention in the form of a diagnostic hip arthroscopy to evaluate for any labral pathology or any hardware in the joint."*

On 1/21/11, Mr. Castro presented for a preoperative history and physical, at which time details of the proposed surgery were discussed. It was documented, *"He is offered a left hip arthroscopy by Dr. Goulet and would like to proceed with this. Risks and benefits are explained to the patient. He displayed understanding."* Also on this date, Mr. Castro signed a consent form for left hip arthroscopy, and possible labral debridement; this form stated, in part, *"My risks include: Pain/discomfort; ...damage to any adjacent structures (nerves, vessels, tissue)..."*

Dr. Goulet performed hip surgery on 2/9/11. He was assisted by Stephen Tolhurst, MD (resident). Mr. Castro was reasonably padded and positioned in preparation for the surgery. Reasonable and appropriate precautions were taken to assure undue pressure would not be exerted in the perineal area. The perineal post was heavily padded with foam. Mr. Castro was slid down to the post, with care taken to ensure his testicles and penis were not crushed. Per the operative note, the risks and benefits of the procedure were again reviewed with Mr. Castro, and care was taken with regard to padding:

"...We have recommended diagnostic arthroscopy, with anticipated repair/debridement of the acetabular labrum. Risks and benefits of surgical intervention were reviewed, and informed consent was obtained...

Mr. Castro was seen in the preoperative area and the left hip marked with an indelible marker. After informed consent was again reviewed, he was subsequently brought to the operating room...Care was taken to pad all bony prominences and cutaneous nerves. A perineal traction post was utilized as well as Smith and Nephew padded traction boots. The right lower extremity was placed in the well leg contralateral traction holder. The left leg was placed in the ipsilateral traction system. With the leg in abduction, traction was applied, and the leg adducted and the foot internally rotated. Fluoroscopy confirmed excellent distraction of the joint to approximately 8 millimeters..."

Intraoperatively, an inflamed hemorrhagic synovitis was noted and debrided to stable margins. A labral tear was also noted and debrided. Mr. Castro was brought back to the recovery room, with no apparent complications. The total case was just over two hours long, with the traction time less than the time from incision to surgical dressing.

Postoperatively, Mr. Castro reported decreased sensation to light touch over the sides of his penis, and urinary retention. He was discharged home on 2/10/11 (David Ruta, MD was the resident physician listed on the discharge summary). At that time, he reported ease of urination, and improvement in his penile sensation.

Mr. Castro called the UMHS orthopedic surgery clinic on 2/11/11. He reported he could not get an erection, but that he had been able to immediately after surgery in the PACU. He was referred to Urology, and the Urology clinic contacted him to schedule an appointment.

Mr. Castro presented to the Urology clinic on 2/24/11, and refused to be seen by a female provider. As a result, Dana Ohl, MD, made accommodations to see Mr. Castro that day. Dr. Ohl noted Mr. Castro complained of penile numbness and pain when urinating since the surgery. Mr. Castro underwent Rigiscan testing to examine erectile activity. Dr. Ohl documented the patient had one erection, with minimal rigidity. Dr. Ohl observed that while multiple precautions with padding were undertaken to assure undue pressure would not be exerted in the perineal area, he surmised that pressure was nevertheless encountered in the perineum, perhaps due to Mr. Castro's thin frame (height 65 inches, weight 129). Dr. Ohl noted that Mr. Castro's description of numbness was similar to that seen with competitive bicyclists, and that those individuals' perineal pressure symptoms typically resolve within several weeks of cessation of the activity. Dr. Ohl was confident Mr. Castro's penile sensitivity would return with time.

Mr. Castro was also seen in follow up by Dr. Goulet on 2/24/11. Dr. Goulet noted decreased sensation in his penis, but normal sensation in his scrotum and groin. His left hip pain had improved. He was ambulatory, fully weight bearing, and felt that the surgery was successful with some of the pain in his left hip.

In March of 2011, Mr. Castro was seen by his internist (Dr. Kwok), and wanted to restart his testosterone injections for hypogonadism, which had been stopped due to the surgery. Dr. Kwok restarted the testosterone injections.

On 6/1/11, Mr. Castro was seen in follow up by Dr. Ohl. On exam, Dr. Ohl noted a firmness of Mr. Castro's penis. Dr. Ohl recommended nerve conduction velocities, and also prescribed Cialis.

In July of 2011, Mr. Castro reported new hip weakness, pain, and gait abnormality, and was referred for an EMG of the left lower extremity to rule out radiculopathy. The EMG was performed 7/29/11, at which time both the left lower extremity and his penis were studied. Sensory and motor NCS of the left lower extremity were normal, and there was no electrodiagnostic evidence of active or ongoing radiculopathy or plexopathy. On electrodiagnostic study of the dorsal nerve of the penis, the examiner noted he was unable to record a consistent response, but a small amplitude response was seen. Overall, the study was deemed difficult to interpret in isolation.

Mr. Castro has since returned to the UMHS for testosterone injections, and other care. The notes for the visits between August and November of 2011 make no mention of issues with penile numbness. As of 11/8/11, he noted an improvement in energy with testosterone, and stated that he was doing fairly well.

B. THE APPLICABLE STANDARD OF CARE

The standard of care applicable to James Goulet, MD was that of a physician board certified in orthopedic surgery, providing care under the same or similar circumstances.

The standard of care applicable to Stephen Tolhurst, MD was that of a fifth year orthopedic surgery resident, providing care under the same or similar circumstances.

The standard of care applicable to David Ruta, MD was that of a third year orthopedic surgery resident, providing care under the same or similar circumstances. Dr. Ruta was not involved in the 2/9/11 surgery, or the preoperative contacts with Mr. Castro, and as such, was not involved in the events that are the subject of claimant's Notice of Intent.

The standard of care applicable to Joe Thomas Kofoed, MD was that of an emergency medicine resident on rotation in orthopedic surgery, providing care under the same or similar circumstances. Dr. Kofoed was not involved in the 2/9/11 surgery or the preoperative contacts with Mr. Castro, and as such, was not involved in the events that are the subject of claimant's Notice of Intent.

The standard of care applicable to The University of Michigan Health System was that of an academic medical center in Michigan providing health care under the same or similar circumstances.

C. COMPLIANCE WITH THE APPLICABLE STANDARD OF PRACTICE

The care provided to Mr. Castro by these Respondents in all respects conformed to the applicable standard of practice. The NOI claims Mr. Castro should have been informed of the use of the perineal traction post, and

that it can cause injury to Mr. Castro's genitalia. The standard of care did not require the caregivers to specifically convey this information to Mr. Castro in advance of the 2/9/11 surgery. Further, there is no reasonable indication that had this risk been specifically covered preoperatively, that Mr. Castro would not have gone forward with the surgery. Assuming Mr. Castro has neuropraxia secondary to his surgery, this is a very rare (unreported) complication of hip arthroscopy. Still, the potential for nerve injury with any type of surgery is present, as reflected on the consent form Mr. Castro signed. Reasonable precautions were taken to guard against perineal pressure and potential nerve injury. The perineal post was reasonably padded, and the patient's testicles were protected. The time frame Mr. Castro was in traction was reasonable and within the standard of care.

D. THE ALLEGED NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE ALLEGED INJURY.

The injuries claimed in the Notice of Intent to File Claim were not the proximate result of the alleged failure to comply with the applicable standard of practice. Mr. Castro did not suffer injury as a result of any violation of the standard of care on the part of these Respondents. Given Mr. Castro's pre-existing history, and the unusual nature of his complaints, it is not certain Mr. Castro's complaints are secondary to padding or positioning during the 2/9/11 surgery.

RICHARD C. BOOTHMAN
Chief Risk Officer
University of Michigan Health System

Dated: January 26, 2012

PROOF OF SERVICE

Nancy C. Schneider certifies that a copy of the foregoing instrument was faxed and mailed upon the attorney(s) of record of all parties to the above cause by mailing the same to them at their respective business addresses as disclosed by the pleadings of record herein, with postage fully prepaid thereon on January 26, 2012 and by faxing the same to them at their respective fax numbers on January 26, 2012.

NANCY C. SCHNEIDER

University of Michigan
Health System

Richard C. Boothman
Chief Risk Officer, UMHS

Amy C. Blackwell
Claims Analyst, UMHS

C201 Med Inn Building
1500 E. Medical Center Dr. SPC 5825
Ann Arbor, MI 48109-5825
(734) 764-4188
(734) 936-9406 fax

January 26, 2012

James D. Wines Attorney at Law
2254 Georgetown Blvd.
Ann Arbor, MI 48105

RE: Ruben Castro

Dear Mr. Wines:

Please find attached the response to the plaintiff's notice of intent. If you have any questions, please don't hesitate to contact us.

Thank you,

Nancy C. Schneider

NCS/tms
Attachment
Cc: Vicki Young

EXHIBIT M

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RUBEN CASTRO and CHRISTY CASTRO,
Jointly and severally,

Plaintiff,

v.

JAMES ALAN GOULET, M.D., JAMES ALAN GOULET, M.D. P.C., and STEPHEN R. TOLHURST, M.D., jointly and severally,

Defendants.

Case No. 13-138-NH

Honorable David S. Swartz

/

JAMES D. WINES (P22436)
Attorney for Plaintiffs
P.O. Box 130478
Ann Arbor, Michigan 48113-0478
734-996-2722

PATRICK McLAIN (P25458)
DANIEL J. FERRIS (P69633)
KERR, RUSSELL AND WEBER, PLC
Attorneys for Defendants
500 Woodward Avenue, Suite 2500
Detroit, Michigan 48226
313-961-0200
pmclain@kerr-russell.com
dferris@kerr-russell.com

AFFIDAVIT OF VICKI E. YOUNG

STATE OF MICHIGAN)
)SS
COUNTY OF WASHTENAW)

My name is Vicki E. Young.

I have been employed by the University of Michigan Health System since 2004.

Among my duties are to investigate pending malpractice claims.

I make this Affidavit in support of Defendants' Response to Plaintiff's Motion to Extend Time to File Affidavit of Merit 28 Days Pursuant To MCL 600.2912(d)(2).

After Mr. Wines filed his NOI on behalf of Ruben Castro, I investigated the claim.

Defense counsel's description of my conversations with Mr. Wines is accurate.

VICKI E. YOUNG

Subscribed and sworn to before me this
14th day of February, 2013

Notary Public, Washtenaw County, Mich.

My Commission expires: August 14, 2015

EXHIBIT N

JAMES D. WINES, J.D., ESQ. P22436

April 14, 2012

UMHS
APR 17 2012
RISK MANAGEMENT

Vicki Young, RN, BSN
Healthcare Risk Management
300 North Ingalls, Room 8AD6
Ann Arbor, MI., 48109-0478

Fax No. (734) 763-5300

RE: Claim of Ruben Castro

Dear Ms. Young:

I believe the following three [3] page Article from 'The Journal of Arthroscopic and Related Surgery, Vol. 21, No. 1 (January) 2007, pp. 107.el - 107.e3 establishes there has been a safer technique for hip distraction in existence at least since January, 2007, to eliminate the use of the inherently dangerous Perineal Post for said procedures.

Ruben Castro was not only not informed of the known dangers to patients arising from the use of a Perineal Post, but he was not informed of the existence of hip arthroscopy without the use of a Perneal Post.

It was my understanding after your receipt of my last letter dated February 2, 2012, with its attached articles you summoned another medical person for consultation. I have not heard anything regarding the very important failure to warn issue contrary to the standards.

Please advise within the next twenty [20] days, or it shall be necessary to proceed with the filing and service of a Medical Malpractice Suit against those claimed against by Ruben Castro.

Very truly yours.

James D. Wines

cc: Ruben Castro

P.O. Box 130478, Ann Arbor, MI., 48113-0478 Off. No. (734) 996-2722 Fax No. (734) 996-0128
Admitted to State Bar of Michigan December 30, 1965

D

EXHIBIT O

KUZICH v. GOULET, M.D., ET AL

RYAN M. NUNLEY, M.D.

January 16, 2013

Prepared for you by

BIENENSTOCK
NATIONWIDE COURT REPORTING & VIDEO

Bingham Farms/Southfield • Grand Rapids
Ann Arbor • Detroit • Flint • Jackson • Lansing • Mt. Clemens • Saginaw

E

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WASHTENAW

JARED KUZICH,
Plaintiff,
vs.
JAMES ALAN GOULET, M.D., JAMES ALAN GOULET, M.D., P.C. and STEPHEN R. TOUHURST, M.D., jointly and severally,
Defendants.
Case No. 11-701-NH
JARED KUZICH,
Plaintiff,
Honorable Timothy P. Connors
vs.
BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, UNIVERSITY OF MICHIGAN HEALTH SYSTEMS, UNIVERSITY OF MICHIGAN HOSPITALS, and UNIVERSITY HEALTH SERVICE,
Defendants.

DEPOSITION OF RYAN M. NUNLEY, M.D.
Taken on behalf of the Defendants
January 16, 2013
(Starting time of the deposition: 7:30 a.m.)

INDEX OF EXAMINATION

INDEX OF EXHIBITS

(The original exhibits were retained by Mr. McLain.)

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WASHTENAW

JARED KUZICH,
Plaintiff,
vs.
JAMES ALAN GOULET, M.D., JAMES ALAN GOULET, M.D., P.C. and STEPHEN R. TOUHURST, M.D., jointly and severally,
Defendants.
Case No. 11-701-NH
JARED KUZICH,
Plaintiff,
Honorable Timothy P. Connors
vs.
BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, UNIVERSITY OF MICHIGAN HEALTH SYSTEMS, UNIVERSITY OF MICHIGAN HOSPITALS, and UNIVERSITY HEALTH SERVICE,
Defendants.

DEPOSITION OF WITNESS, RYAN M. NUNLEY, M.D., produced, sworn, and examined on the 16th day of January, 2013, between the hours of nine o'clock in the forenoon and six o'clock in the evening of that day, at the offices of Barnes-Jewish Hospital Plaza, West Pavilion, 11th Floor, Suite 11300, St. Louis, Missouri, before BRENDA ORSBORN, a Certified Court Reporter within and for the State of Missouri, in a certain cause now pending in the State of Michigan, in Circuit Court for the County of Washtenaw, wherein Jared Kuzich is the Plaintiff and James Alan Goulet, M.D., et al. are the Defendants.

APPEARANCES

For the Plaintiff:
Mr. Gregory M. Bereznoff
812 S. Main Street, Suite 230
Royal Oaks, Michigan 48067
(248) 543-1920
gblaw1@aol.com

For the Defendants:
Mr. Patrick McLain
Kerr Russell & Weber, PLC
500 Woodward Avenue, Suite 2500
Detroit, Michigan 48226
(313) 961-0200
pmclain@kerr-russell.com

The Court Reporter:
Ms. Brenda Orsbom, RPR/CSR/CCR
Missouri CCR No. 914
Illinois CSR No. 084-003460

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Q. However, SEAK does offer to its member expert witnesses various services; isn't that true?
A. **I'm not sure what you're referring to.**
Q. Well, they have meetings. They have seminars. They have --
A. **I've seen some e-mails like that, but I've never done any of those.**
Q. This is like many other organizations that a doctor or a lawyer gets communications from, correct?
A. **Correct.**
Q. And if you wanted to, you could react to them and go to meetings and go to presentations and buy their publications or not. It's up to you?
A. **Correct.**
Q. And you have never been to a SEAK presentation or seminar or professional meeting?
A. **Yes.**
Q. Yes, you have, or no, you haven't?
A. **No, I was answering yes. You said "You have never," so --**
Q. I'm trying to make sure we're communicating.
A. **I have never been to one of those.**
Q. Okay. How do you evaluate whether your $395 is well spent, given that the attorney contacting you in any given case is just contacting you and may or

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may not have come from this source?
MR. BEREZNOFF: Form and foundation.
A. **I don't -- I don't know. I mean, I guess it's just a personal decision.**
Q. (By Mr. McLain) Do you have reason to believe that your $395 is well spent, that you're getting referrals?
MR. BEREZNOFF: Form and foundation.
A. **There are some other of our faculty members who have done it and said it's a good way, and so that's how I got involved with it.**
Q. (By Mr. McLain) Okay. So your elders and betters told you it was a productive endeavor?
A. **Correct.**
Q. And so you just took their advice?
A. **Correct.**
Q. Whether it is or not, you're not sure?
A. **Correct.**
Q. Have you ever testified in a State of Michigan lawsuit before this one?
A. **Testify as in a trial?**
Q. Or a deposition.
A. **I don't believe I've done a Michigan deposition.**
Q. Is this the first Michigan case that you

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recall reviewing?
A. **No. I have another, at least one -- no, two other Michigan cases.**
Q. That are pending now --
A. **Correct.**
Q. -- in which no testimony has been given by you?
A. **Correct.**
Q. Are those cases in which the plaintiff's attorney is consulting you as opposed to the defendant's attorney?
A. **Both of those are plaintiffs.**
Q. Are they Bereznoff cases, or are they non-Bereznoff cases?
A. **Both non-Bereznoff.**
Q. Do you remember the names of the Michigan lawyers who consulted you in those two other cases?
A. **Mike Gagleard. I think it's G-A-G-L-E-A-R-D.**
Q. Okay.
A. **And then Jim Wines about another hip scope case. Wines as in wine with an "S."**
MR. BEREZNOFF: If I may interject, Doctor, if you did give another name, I missed it.
THE WITNESS: Jim Wines.

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MR. BEREZNOFF: Thank you.
Q. (By Mr. McLain) When did you last consult with Jim Wines?
A. **He happened to call me last week.**
Q. What's your understanding of the status of the Jim Wines case?
A. **That they have not filed anything. He wants me to review the records for another nerve injury case.**
Q. Did you agree to do that?
A. **I told him I would look at the records.**
Q. This is not a case you had seen before?
A. **No.**
Q. He just called you last week?
A. **I had been contacted maybe four or five months ago about it and told him the -- somebody who asked if I would review it, and I said yes, but I never got anything, and then he called out of the blue last week.**
Q. The person who called you before was someone other than Jim Wines?
A. **Correct.**
Q. Have you actually seen the records in that case yet?
A. **No, only a summary.**

EXHIBIT P

Unpublished Opinions

SOSINSKI v. *TROSIN*

Court of Appeals of Michigan

August 26, 2003, Decided

No. 239781

Reporter
2003 Mich. App. LEXIS 2073; 2003 WL 22018396

MAYO SOSINSKI and LEONARD SOSINSKI, Plaintiffs-Appellants, v CYNTHIA M. TROSIN, D.O., P.C. and CYNTHIA M. TROSIN, D.O., Defendants, and MYRON R. EMERICK, D.O., Defendant-Appellee.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Macomb Circuit Court. LC No. 96-005055-NH.

Disposition: Affirmed.

Core Terms

affidavit of merit, trial court, limitations period, expired, days, summary disposition, plaintiffs filed, tolled, limitations

Judges: Before: Zahra, P.J., and Talbot and Owens, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right the trial court's order striking plaintiffs' affidavit of merit and granting defendant Myron Emerick summary disposition. We affirm. We decide this appeal without oral argument pursuant to *MCR 7.214(E)*.

Plaintiffs argue that the trial court erred in striking their affidavit of merit and granting summary disposition in favor of Dr. Emerick. The dispositive issue on this appeal is whether the trial court was required by the law of the case doctrine to follow an earlier determination from this Court. We conclude that the law of the case doctrine is inapplicable.

I. Procedural History

The procedural history of this medical malpractice case is unusual. On June 21, 1996, plaintiffs filed their complaint and attempted to file a motion to extend the time in which to file an affidavit of merit. However, plaintiffs did not file the motion with the lower court clerk **[*2]** but presented the motion directly to the circuit court. The court advised plaintiffs that a hearing on the motion was necessary. On July 3, 1996, twelve days after filing their complaint, plaintiffs filed the motion. The trial court granted the motion on July 15, 1996, and plaintiffs filed their affidavit of merit four days later. Defendants moved for summary disposition on the ground that the period of limitations had expired. The trial court granted summary disposition to all defendants, ruling that the period of limitations had expired at the time plaintiffs filed the complaint on June 21, 1996.

This Court affirmed the trial court's order with respect to defendant Cynthia Trosin but reversed with respect to Dr. Emerick. This Court held in an unpublished opinion that the filing of a motion to extend the time for filing the affidavit of merit tolled the statute of limitations. This Court determined that the period of limitations against Dr. Emerick was due to expire on July 8, 1996, but that it was tolled when plaintiffs filed their motion five days earlier, on July 3, 1996. Accordingly, this Court concluded that the complaint against Dr. Emerick was timely filed. ***Sosinski v Trosin*** **[*3]** , unpublished opinion per curiam of the Court of Appeals, issued 01/16/01 (Docket No. 217178).

Thirty-five days after the case was remanded, a different panel of this Court published its decision in *Barlett v North Ottawa Community Hosp, 244 Mich. App. 685; 625 N.W.2d 470 (2001)*. *Barlett* held that, although *MCL 600.2912d(2)* provides an additional twenty-eight days to file an affidavit of merit for good cause, the mere filing of a motion to extend the time for filing an affidavit of merit is insufficient to toll the statute of limitations. *Id. at 691-693*. Instead, it is the granting of a motion that tolls the limitations period in a medical malpractice action. *Id.*

After this case was remanded, Dr. Emerick filed a motion to strike the affidavit of merit on the ground that plaintiffs failed to show good cause to extend the time for filing it. The trial court was faced with the determination of this Court that the affidavit of merit was timely based on the *filing* of the motion while recognizing that the published decision in *Barlett* held that the determinative factor was the *granting* of the motion. The trial **[*4]** court relied on the decision in *Barlett* and granted summary disposition on the ground that the period of limitations had expired before plaintiffs filed their affidavit of merit. This appeal followed.

II. Analysis

Absent factual disputes, the determination whether a claim is barred by the expiration of the limitations period is a question of law that we review de novo. *Young v Sellers,*

254 Mich. App. 447, 450; 657 N.W.2d 555 (2002). A trial court's grant of summary disposition under MCR 2.116(C)(7) is reviewed de novo. Id. at 449.

Pursuant to the law of the case doctrine, a ruling by this Court binds the trial court on remand. Sumner v General Motors Corp (On Remand), 245 Mich. App. 653, 661; 633 N.W.2d 1 (2001). A trial court "may not take any action on remand that is inconsistent with the judgment of the appellate court" and the doctrine applies "regardless of the correctness of the appellate court's decision." Id. at 662 (citations omitted). "However, the doctrine does not apply where there has been an intervening change of law." *Id.*

Here, an intervening change of law occurred. In a medical malpractice **[*5]** action, a plaintiff must comply with the statutory filing requirements under MCL 600.2912d(1), which provides that the plaintiff or his attorney "shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness . . . ." The "use of the word 'shall' indicates that an affidavit accompanying the complaint is mandatory and imperative." Scarsella v Pollak (Scarsella II), 461 Mich. 547, 549; 607 N.W.2d 711 (2000) (citation omitted). The existing case law construing the statutory authority governing medical malpractice actions states that the failure to timely file a complaint and an affidavit of merit will not toll the applicable limitations period. Young, supra at 450. MCL 600.2912d(2) provides:

> Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

Prior **[*6]** to the decision in *Barlett*, no published appellate decision squarely addressed the question whether the period of limitations was tolled by the filing or by the granting of a motion to extend the time in which to file an affidavit of merit. In the first appeal in this case, this Court determined the question by merely citing to the general legal principles in Solowy v Oakwood Hospital Corp, 454 Mich. 214, 229; 561 N.W.2d 843 (1997) and Scarsella v Pollak (Scarsella I), 232 Mich. App. 61, 64; 591 N.W.2d 257 (1998), aff'd, Scarsella (II), supra. These two cases did not address the issue at hand and this Court's determination was not grounded on the rule of law in *Solowy* and *Scarsella.* Rather, the rule of law for the issue in this case was established for the first time in *Barlett.* We conclude that the decision in *Barlett* constitutes an intervening change of law. Accordingly, the holding of this Court in the first appeal was not binding on the trial court.

In this case, plaintiffs filed their complaint seventeen days before the statute of limitations expired. Plaintiffs were immediately informed **[*7]** by the circuit court that

a hearing was required for their motion seeking a twenty-eight-day extension of time under *MCL 600.2912d(2)* in which to file their affidavit of merit. However, plaintiffs waited twelve days until they filed their motion, five days before the period of limitations expired. Relying on *Barlett, supra*, the trial court granted Dr. Emerick's motion for summary disposition after stating that the order granting an extension of time was not entered until after the expiration of the statute of limitations. We conclude on the basis of *Barlett* that the trial court properly granted the motion for summary disposition because the court's actual grant of an extension of time did not occur until after the expiration of the statute of limitations.

In light of the above conclusion, we need not address plaintiffs' remaining arguments on appeal.

Affirmed.

/s/ Brian K. Zahra

/s/ Michael J. Talbot

/s/ Donald S. Owens

MOYA-JURE v. *IUNG*

Court of Appeals of Michigan

May 11, 2004, Decided

No. 245670

Reporter
2004 Mich. App. LEXIS 1171; 2004 WL 1057791

MILEIDI MOYA-JURE and LAZARO RAVELO, Plaintiffs-Appellees, v. OMERO S. IUNG, M.D., Defendant-Appellant.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Ingham Circuit Court. LC No. 02-001325-MN.

Disposition: Reversed.

Core Terms

affidavit of merit, trial court, limitations period, plaintiffs', summary disposition, expired, toll, malpractice, defense motion, limitations

Judges: Before: Murray, P.J., and Neff and Donofrio, JJ.

Opinion

PER CURIAM.

Defendant appeals by leave granted from an order denying defendant's motion for summary disposition of plaintiffs' medical malpractice claim pursuant to *MCR 2.116(C)(7)*. Defendant argues that the trial court erred as a matter of law when it denied defendant's motion for summary disposition. After reviewing applicable precedent we agree that the trial court erred, and reverse.

The relevant facts are not in dispute. Plaintiffs' claim for medical malpractice arises out of surgery performed on plaintiff Mileidi Moya-Jure on September 5, 2000. On March 1, 2002, plaintiffs filed a notice of intent to file suit. The notice period expired on

September 1, 2002. On September 4, 2002, one day before the expiration of the statute of limitations, plaintiffs filed a complaint, but not an affidavit of merit as required by MCL 600.2912d. Plaintiffs subsequently filed an affidavit [*2] of merit on October 2, 2002, but had never filed a motion to extend the time for filing the affidavit.

Defendant moved for summary disposition on October 22, 2002, arguing that plaintiffs' claim was time-barred because they failed to file an affidavit of merit before the limitations period expired and because no motion to extend the time for filing, as permitted by MCL 600.2912d(2), had been granted before the deadline. On November 5, 2002, plaintiffs moved for an extension of time to file the affidavit of merit pursuant to MCL 600.2912d(2). The trial court conducted a hearing on both motions on November 22, 2002.

Defendant argued that summary disposition was compelled by this Court's decision in Barlett v North Ottawa Community Hosp, 244 Mich. App. 685; 625 N.W.2d 470 (2001). In *Barlett*, this Court held that the mere filing of a motion to extend the time for filing the affidavit of merit with the complaint was insufficient to toll the statute of limitations because only the granting of such a motion could toll the limitations period. Id. at 692. Here, the trial court distinguished *Barlett* [*3] on the ground that the trial court in that case ultimately denied the motion to extend the time for filing the affidavit. The court reasoned that *Barlett* had no application to a situation where the trial court ultimately grants the motion to extend. Consequently, the court concluded that the holding of *Barlett* was mere dicta and granted plaintiffs' motion to extend, finding that there was good cause for the delay. *Id.* at 21. At the same time, the court denied defendant's motion. *Id.*

On appeal, defendant contends that the trial court erred in denying his motion because the holding of *Barlett* did not turn on whether the trial court eventually granted or denied the motion to extend time, rather, this Court simply held that the statute of limitations is not tolled unless a motion to extend time is granted within the limitations period. Because that did not happen in this case, defendant maintains that the trial court could not effect a retroactive tolling of the limitations period by granting the untimely motion to extend. Defendant also asserts that the court erred by finding that good cause existed to justify the late filing.

Plaintiffs argue that the trial court [*4] correctly concluded that this Court's decision in Barlett, supra, was not binding and distinguishable on its facts. Plaintiffs contend that defendant was not prejudiced by the late filing, and MCL 600.2912d neither requires that the motion be filed within the statutory limitations period nor provides for a penalty for late filing.

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). Di Ponio Construction Co, Inc v Rosati Masonry Co, Inc, 246

Mich. App. 43, 46-47; 631 N.W.2d 59 (2001), citing Diehl v Danuloff, 242 Mich. App. 120, 122-123; 618 N.W.2d 83 (2000). This Court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence that has been submitted by the parties. Diehl, supra, 242 Mich. App. at 123. Additionally, "whether plaintiff's claim is statutorily time-barred is a question of law for this Court to decide de novo." DiPonio, supra, 246 Mich. App. 47, quoting Ins Comm'r v Aageson Thibo Agency, 226 Mich. App. 336, 340-341; 573 N.W.2d 637 (1997). **[*5]**

In MCL 600.2912d, the Legislature set forth the requirements for commencing a medical malpractice claim. That statute provides, in relevant part:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or . . . the plaintiff's attorney *shall file with the complaint an affidavit of merit* signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.
>
> * * *
>
> (2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

"The existing case law construing the statutory authority governing medical malpractice actions states that the failure to timely file a complaint *and* an affidavit of merit will not toll the applicable limitations period." Young v Sellers, 254 Mich. App. 447, 450; 657 N.W.2d 555 (2002); see also Scarsella v Pollak, 461 Mich. 547, 550; 607 N.W.2d 711 (2000); **[*6]** Holmes v Michigan Capital Medical Center, 242 Mich. App. 703, 706-707; 620 N.W.2d 319 (2000). Although MCL 600.2912d(2) provides an additional twenty-eight days to file an affidavit of merit for good cause shown, the mere filing of a motion to extend the time for filing an affidavit of merit is insufficient to toll the statute of limitations. It is the granting, for good cause shown, of a timely noticed motion to extend the time for filing an affidavit of merit that tolls the period of limitation in a medical malpractice action. Barlett, supra, at 692-693.

Whether the trial court would have granted the motion to extend time was irrelevant to the decision in Barlett, supra. In that case, this Court's opinion was solely concerned with events occurring before the expiration of the limitations period that might have tolled it. In Young, supra, the plaintiff's attorney inadvertently failed to file the affidavit of merit with the complaint, even though it was completed, signed and notarized, and did not discover the omission until some time later. Young, supra, 254 [*7] Mich. App.

at 448. The limitations period in that case expired on December 10, 2001, and the affidavit of merit was not filed until January 9, 2002, slightly more than twenty-eight days after the expiration of the limitations period. On January 14, 2002, the plaintiff moved for an extension of time to file the affidavit of merit, and, just as in this case, the defendant moved for summary disposition. The trial court in that case granted the motion to extend time and entered an order that allowed the date of filing of the affidavit of merit to be amended nunc pro tunc to the date of the filing of the complaint; accordingly, it also denied defendant's motion for summary disposition. *Id. at 449*. This Court reluctantly reversed on the basis of *Barlett*, *supra*, at 452. Such a result is also compelled by *Holmes, supra, 242 Mich. App. at 709*.

Plaintiff argues that *Young, supra*, is distinguishable because the affidavit of merit in that case was not filed within twenty-eight days of the date of filing of the complaint. However, this fact did not form the basis for this Court's decision in *Young*. Instead, it was the fact that the statute **[*8]** of limitations expired without an affidavit of merit having been filed or a motion to extend time to file the affidavit having been granted. *Young, supra*, is binding authority under *MCR 7.215(I)(1)*. Consequently, the trial court erred in denying defendant's motion for summary disposition. The fact that it granted plaintiffs' motion to extend time for filing the affidavit of merit is irrelevant since the granting of the motion after the limitations period expired did not revive plaintiffs' claim. Furthermore, even if plaintiffs' claims could be revived by such a motion, the court gave no reasons whatsoever to support its finding that plaintiffs had shown good cause for the late filing, another fact distinguishing this case from *Young, supra.* Plaintiffs' attorney stated in the motion to extend time for filing the affidavit that he was waiting until after defendant's insurance company turned down the claim to obtain an affidavit of merit. The rejection of claim was sent on August 14, 2002, counsel went on vacation August 19, 2002, and he started to attend to the filing of the complaint and the securing of the affidavit of merit on August 26, 2002. However, there is no **[*9]** reason plaintiffs' attorney could not have obtained an affidavit of merit before rejection occurred given the fact that the affidavit of merit affiant provided expert assistance to counsel for plaintiffs in the preparation of the notice of intent, and particularly where the end of the limitations period was imminent.

Reversed.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Pat M. Donofrio

INLOES v. *ALTON*

Court of Appeals of Michigan

May 19, 2005, Decided

No. 253841

Reporter
2005 Mich. App. LEXIS 1264; 2005 WL 1189677

MARSHA INLOES and WILLIAM H. INLOES, Plaintiffs-Appellants, v LARRY ALTON, D.O., MONTROSE CLINIC, DEBRA JOHNSON, C.N.P., and MICHAEL F. SUGG, D.O., Defendants, and MCLAREN REGIONAL MEDICAL CENTER, Defendant-Appellee.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Genesee Circuit Court. LC No. 01-070121-NH.

Disposition: Affirmed.

Core Terms

statute of limitations, limitations period, affidavit of merit, summary disposition, plaintiffs', tolled, malpractice, trial court, expiration, equitable tolling, plaintiffs filed, insane

Judges: Before: Saad, P.J., and Zahra and Schuette, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendant McLaren Regional Medical Center. We affirm.

I. Facts and Procedure

In this medical malpractice suit, plaintiffs allege that defendants' failure to properly treat plaintiff Marsha Inloes on October 15, 1998, caused her to suffer an acute cerebral

vascular accident (i.e., a stroke). On October 4, 2000, plaintiffs filed a notice of intent to file a claim pursuant to MCL 600.2912b(1). [1] On April 16, 2001, the last day of the applicable two-year limitations period, [2] MCL 600.5805(6), [3] plaintiffs filed their complaint. But instead of filing an affidavit of merit with the complaint as required by MCL 600.2912d, [4] [*3] plaintiffs filed a petition to extend the time for filing the affidavit by twenty-eight days. The [*2] trial court granted plaintiffs' petition, but did not sign the order granting the extension for filing the affidavit until April 21, 2001. On May 17, 2001, plaintiffs filed three affidavits of merit. On April 9, 2003, the trial court granted McLaren Regional's motion for summary disposition based on plaintiff's failure to file an affidavit of merit within the statute of limitations. [5]

II. Analysis

A. Standard of Review

Decisions regarding summary disposition are reviewed de novo. Waltz v Wyse, 469 Mich. 642, 647; 677 N.W.2d 813 (2004). "In the absence of disputed facts, whether a cause of action is barred by the statute of limitations is a question of law that is reviewed de novo." *Ward v Rooney-Gandy*, __Mich. App. __; __N.W.2d __(Docket No. 250174, issued March 22, 2005), slip op at 2. The trial court's order indicates that summary disposition was granted under MCR 2.116(C)(8) (failure to state a claim). However, because the trial court relied on the statute of limitations as the basis for dismissal, the applicable subrule is MCR 2.116(C)(7) (claim barred by the statute of limitations).

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[1] MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

[2] The parties agree that the applicable statute of limitations period expired on this date.

[3] MCL 600.5805(6) provides:

> Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

[4] MCL 600.2912d provides, in pertinent part:

> Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.

[5] This Court previously dismissed plaintiffs' claims against defendants Alton and Montrose Clinic for the same reason. ***Inloes v Alton***, unpublished order of the Court of Appeals, entered February 3, 2003 (Docket No. 244096).

Waltz, supra at 647. **[*4]** Where summary disposition is granted under the wrong subrule, the defect is not fatal and does not preclude appellate review where, as here, the record permits review under the correct subrule. *Gibson v Neelis, 227 Mich. App. 187, 189; 575 N.W.2d 313 (1997)*.

> "When reviewing a motion for summary disposition under *MCR 2.116(C)(7)*, a court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact. If no facts are in dispute, and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is barred by the statute of limitations is a question for the court as a matter of law. However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate." [*Guerra v Garratt, 222 Mich. App. 285, 289; 564 N.W.2d 121 (1997)*, quoting *Baker v DEC Int'l, 218 Mich. App. 249, 252-253; 553 N.W.2d 667 (1996)*. **[*5]** rev'd in part on other grounds *458 Mich. 247; 580 N.W.2d 894 (1998)*.]

B. Discussion

Plaintiffs argue that the trial court erred in granting McLaren Regional's motion for summary disposition based on the expiration of the statute of limitations. To properly commence a medical malpractice action, a plaintiff must file both a complaint and an affidavit of merit. *Mouradian v Goldberg, 256 Mich. App. 566, 571; 664 N.W.2d 805 (2003)*; *MCL 600.2912d*. Plaintiffs maintain that because the statute of limitations was tolled, the limitations period did not expire before they filed their affidavits of merit. Plaintiff first argues that the statute of limitations was tolled because Marsha Inloes was insane within the meaning of *MCL 600.5851(1)*. We disagree. *MCL 600.5851(1)* provides, in pertinent part:

> If the person first entitled to make an entry or bring an action under this act is . . . insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to **[*6]** make the entry or bring the action although the period of limitations has run.

Insanity for purposes of this statute is "a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane." *MCL 600.5851(2)*. The insanity must exist at the time the claim accrues, not come into existence after the claim has accrued. *MCL 600.5851(3)*. In order to avoid summary disposition under MCL 2.116(C)(7), the plaintiff must submit documentary

evidence that creates a question of fact with respect to whether the plaintiff was deranged at the time his claim accrued. *Asher v Exxon Co, USA, 200 Mich. App. 635, 641; 504 N.W.2d 728 (1993)*.

Here, although plaintiffs submitted evidence indicating that Marsha Inloes was experiencing various physical symptoms, was crying, and was nonverbal on October 15, 1998, the date of the allegedly negligent treatment by defendant McLaren Regional, plaintiffs' evidence failed to establish an issue of fact concerning whether she **[*7]** had a condition of mental derangement such as to prevent her from comprehending her rights. Thus, plaintiffs failed to show that the statute of limitations was tolled by *MCL 600.5851*.

Plaintiffs also argue that the statute of limitations was tolled because they filed a petition to extend the time for filing an affidavit of merit before the expiration of the limitations period and the court later granted the extension. We disagree. It is not the mere filing of a motion to extend time that tolls the period of limitation. *Young v Sellers, 254 Mich. App. 447, 451; 657 N.W.2d 555 (2002)*, citing *Barlett v North Ottawa Community Hosp, 244 Mich. App. 685, 692; 625 N.W.2d 470 (2001)*. Rather, it is the granting of such a motion that tolls the period of limitation. *Barlett, supra at 692-694*. Therefore, the statute of limitations was not tolled by the mere filing of plaintiffs' petition on April 16, 2001, the last day of the limitations period. Because plaintiffs failed to properly commence their lawsuit within the period of limitation by filing an affidavit of merit or obtaining an order granting **[*8]** an extension of time to file such an affidavit, [6] the trial court properly determined that plaintiffs' suit was barred by the statute of limitations. [7] *Id. at 693-694*.

[*9] Finally, plaintiffs argue that the period of limitation should be extended under the doctrine of equitable tolling. We disagree. The doctrine of equitable tolling should only be invoked in rare circumstances to prevent injustice and provide the plaintiff with his

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[6] Although the trial court signed an order granting plaintiffs' motion to extend the time for filing an affidavit of merit by twenty-eight days, it did not sign this order until the period of limitation had expired.

[7] We note that this result is consistent with this Court's peremptory order in Docket No. 244096, where this Court reversed the trial court's order denying summary disposition to defendants Alton and the Montrose Clinic and held that these defendants were entitled to dismissal of plaintiffs' lawsuit:

> Plaintiffs' petition to extend time for filing an affidavit of merit did not toll the running of the limitations period for their medical malpractice action. *Barlett v North Ottawa Community Hospital*, 244 Mich. App. 685; 625 N.W.2d 470 (2001). The circuit court's order granting the extension of time was not entered until after the limitations period had run. Plaintiffs' medical malpractice action is barred by the statute of limitations, so defendants are entitled to dismissal of plaintiffs' complaint. *Scarsella v Pollak*, 461 Mich. 547; 607 N.W.2d 711 (2000). [***Inloes v Alton***, unpublished order of the Court of Appeals, entered February 3, 2003 (Docket No. 244096).]

Although the parties do not discuss the issue, the law of the case doctrine militates against deciding this question differently in this appeal. *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich. App. 556, 559; 528 N.W.2d 787 (1995).

day in court. *Ward, supra* at 4. "Equitable tolling has been applied where 'the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.' " *Ward, supra* at 3, quoting *51 Am Jurisdiction 2d, Limitation of Actions, § 174*, p 563. Equitable tolling has also been applied where the plaintiff's failure to file an affidavit of merit within the limitations period was due to a clerical error of attaching the wrong affidavit to the complaint, *Ward, supra* at 4, or understandable confusion about the legal nature of his claim, rather than negligent failure to preserve his rights, *Bryant v Oakpointe Villa Nursing Center, 471 Mich. 411, 432; 684 N.W.2d 864 (2004)*. The present case **[*10]** involves none of these circumstances. Further, plaintiffs filed their affidavits of merit on May 17, 2001, which was more than twenty-eight days after the expiration of the period of limitation. "A plaintiff must exercise reasonable diligence in investigating and bringing his claim. *Ward, supra* at 3. We conclude that this is not one of the rare cases were equitable tolling is appropriate to extend the limitations period.

Affirmed.

/s/ Henry William Saad

/s/ Brian K. Zahra

/s/ Bill Schuette

OHANNESIAN v. BUTTERWORTH HOSP.

Court of Appeals of Michigan

November 16, 2004, Decided

No. 245933

Reporter
2004 Mich. App. LEXIS 3131; 2004 WL 2601229

MICHAEL OHANNESIAN and NANCY OHANNESIAN, Plaintiffs-Appellants/Cross-Appellees, v BUTTERWORTH HOSPITAL, Defendant-Appellee/Cross-Appellant, and DR. LYNN S. HEDEMAN and LYNN S. HEDEMAN, M.D., P.C., Defendants.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Kent Circuit Court. LC No. 98-006190-NH.

Disposition: Affirmed.

Core Terms

affidavit of merit, plaintiffs', medical malpractice, trial court, statute of limitations, ordinary negligence, summary disposition, sounds, malpractice, toll, medical malpractice claim, defense motion, twenty-eight, standard of care, expired, days, statutory requirements, common knowledge, plaintiffs filed, requirements, surgery, staff, expert testimony, health facility, oral argument

Judges: Before: Borrello, P.J., and Murray and Fort Hood, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right from the final order in this case, entering judgment in favor of plaintiffs in accordance with the case evaluation award against defendants Dr. Lynn S. Hedeman and Lynn S. Hedeman, M.D., P.C. (collectively referred to as Hedeman). On appeal, plaintiffs contest the trial court's rulings in favor of Butterworth Hospital

(defendant) on its various motions for summary disposition, arguing that the trial court was required to review Hedeman's peer review and privileges file to determine whether there was evidence that was not protected by the peer review privilege, and that the trial court erred in granting defendant's motions for summary disposition because they have stated a valid claim for ordinary negligence, or alternatively for medical malpractice. Defendant has filed a cross-appeal in this matter, contending that the trial court erred in denying its initial **[*2]** motion for summary disposition because plaintiffs' claim against it was for medical malpractice, and that the statute of limitations operated to bar plaintiffs' claim because they did not to file a timely affidavit of merit with respect to the claim brought against defendant. We affirm.

I. Material Facts and Proceedings

On June 20, 1996, Dr. Hedeman performed lower back surgery (lumbar laminectomy) on Michael Ohannesian at defendant hospital. According to Michael, Dr. Hedeman subsequently informed him that he had operated at the wrong level, and Michael discovered that he still had a bulging or herniated disc. Dr. Hedeman apparently operated at the L2-3 level instead of the L3-4 level, and Michael required a second surgery to correct the error.

On June 16, 1998, plaintiffs filed a complaint against Hedeman and defendant. In addition to claims of medical malpractice brought against Hedeman, plaintiffs also alleged one count of "Negligence or Malpractice of Defendant Butterworth Hospital." [1] In response to plaintiffs' complaint, defendant brought a motion for summary disposition, arguing that dismissal was proper because plaintiffs failed to file an affidavit of merit with respect **[*3]** to the medical malpractice claim brought against it. Defendant contended that although plaintiffs filed an affidavit of merit with their complaint, it did not pertain to the standard of care for the claim brought against defendant. Plaintiffs responded that their claim against defendant sounded in ordinary negligence and not medical malpractice.

Following oral argument on defendant's motion, the trial court determined, "This is a malpractice case, and where required an affidavit [sic] has not been filed in support of that malpractice. Having reviewed all four corners of the pleadings, I don't think I have any choice but to dismiss and grant Summary pursuant to the request of Butterworth Hospital." The trial court then concluded that plaintiffs failed to demonstrate good cause to permit them an additional twenty-eight days to file a second **[*4]** affidavit of merit. Regardless of the trial court's determination, however, plaintiffs were given an

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[1] Contrary to the representations by plaintiffs' counsel during oral argument, the initial complaint contained the heading "Negligence or Malpractice" against defendant.

additional twenty-eight days to file an affidavit. [2] On November 24, 1998, the trial court entered an order denying defendant's motion for summary disposition, and further ordered that plaintiffs had until November 10, 1998, to file an affidavit of merit in accordance with *MCL 600.2912d*.

Defendant then brought a second motion for summary disposition, contending that plaintiffs' claim against it should be dismissed because their failure to file the affidavit of merit with the complaint rendered the complaint null since it was not filed until after the statute of limitations had run. Plaintiffs responded that defendant previously raised the same issues, and reconsideration of the court's prior order was unnecessary. Plaintiffs maintained that the claim against defendant **[*5]** was for negligence, and that it was not subject to the medical malpractice statute of limitations. Plaintiffs later contended in a supplemental response that the statute did not require multiple affidavits of merit, and their initial affidavit of merit was sufficient because the claim against defendant was derivative of the medical malpractice claim brought against Hedeman.

The trial court denied defendant's second motion for summary disposition. The court first indicated that if plaintiffs correctly identified their action against defendant as one for negligence, the statute of limitations did not apply. The court stated that it was not sure whether the statutory requirements could be met regarding claims brought against a medical facility because there was no certification requirement for hospital administrators, but concluded that regardless of whether plaintiffs' claim sounded in malpractice or in negligence, plaintiffs could not get an affidavit because there was no licensed specialist in Michigan that met the criteria of *MCL 600.2169*.

Defendant subsequently brought three separate motions for partial summary disposition, all of which the trial court **[*6]** granted. The trial court first determined that plaintiffs' claim against defendant sounded in medical malpractice and not ordinary negligence. The court next found that plaintiff failed to raise a genuine issue of material fact regarding defendant's appointment or reappointment, or supervision of Hedeman, and also that plaintiffs failed to establish a causal connection between the amount of Hedeman's insurance coverage and any damage to plaintiffs. Finally, regarding the issue of informed consent, the court determined that there was no evidence that Hedeman failed to obtain informed consent or that any verification by defendant of properly obtained informed consent would have led Michael to decide not to have the surgery.

II. Medical Malpractice or Ordinary Negligence

We first address the issue regarding the nature of plaintiffs' claim against defendant (i.e., does plaintiffs' claim sound in medical malpractice or ordinary negligence). This Court

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[2] Plaintiffs thereafter submitted William L. Nellis's affidavit to the trial court within the twenty-eight day extension.

utilizes the de novo standard in determining whether the nature of a claim is ordinary negligence or medical malpractice. *Bryant v Oakpointe Villa Nursing Centre, Inc, 471 Mich. 411, 419; 684 N.W.2d 864 (2004).* [*7] We find that plaintiffs' claim against defendant sounds in medical malpractice and not ordinary negligence.

In determining whether a claim sounds in ordinary negligence or in medical malpractice, the Michigan Supreme Court explained that a court must ask two fundamental questions: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. *Bryant, supra at 422*. If both these questions are answered affirmatively, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. *Id.*; see also *Dorris v Detroit Osteopathic Hosp Corp, 460 Mich. 26, 45; 594 N.W.2d 455 (1999)*. "A professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed health care professional, licensed health care facility, or the agents or employees of a licensed health care facility, were subject to a contractual duty that required that professional, that facility, or the agents or employees of that [*8] facility, to render professional health care services to the plaintiff." *Bryant, supra at 422-423*, citing *Dyer v Trachtman, 470 Mich. 45; 679 N.W.2d 311 (2004)*; *Delahunt v Finton, 244 Mich. 226, 230; 221 NW 168 (1928)* ("Malpractice, in its ordinary sense, is the negligent performance by a physician or surgeon of the duties devolved and incumbent upon him on account of his contractual relations with his patient."); see also *Oja v Kin, 229 Mich. App. 184, 187; 581 N.W.2d 739 (1998)*; *Hill v Kokosky, 186 Mich. App. 300, 302-303; 463 N.W.2d 265 (1990)*; *Bronson v Sisters of Mercy Health Corp, 175 Mich. App. 647, 652; 438 N.W.2d 276 (1989)*. If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence; however, if the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, the claim sounds [*9] in medical malpractice. *Bryant, supra at 423*.

Based upon our Supreme Court's thorough analysis of the law surrounding this issue, along with an independent review of each of plaintiffs' specific allegations, we find that plaintiffs' claim against defendant sounds in medical malpractice rather than ordinary negligence. As stated in *Bronson*, a case cited in both *Dorris* and *Bryant*, claims of negligent selection, retention, and supervision of staff physicians sound in medical malpractice:

> The providing of professional medical care and treatment by a hospital includes supervision of staff physicians and decisions regarding selection and retention of medical staff. [*Bronson, supra at 652-653*.]

Additionally, the reasoning of *Bronson* is in accordance with *Bryant*. First, there was a professional relationship between Michael and defendant hospital, as Michael's surgery was performed by Hedeman in defendant hospital. Second, the alleged acts of negligence, with respect to the selection, retention, and supervision of Hedeman, do not raise issues that are within the common knowledge and experience of the jury. The requirements **[*10]** necessary to obtain or retain staff privileges, and the procedures and judgment involved in determining whether a physician is sufficiently competent to perform medical procedures involve medical judgment and are not within the common knowledge or understanding of the average person.

Further, the issue of the amount of liability insurance a physician should carry is similarly not within that common knowledge. Indeed, plaintiffs' argument that a neurosurgeon should carry a higher amount of liability insurance than other types of physicians supports this conclusion, as does plaintiffs' evidence that the minimum amount required by local hospitals varies. Accordingly, plaintiffs' allegation regarding the issue of liability insurance coverage sounds in medical malpractice.

Finally, plaintiffs' claim that defendant permitted Hedeman to retain his staff privileges after they had notice that he refused to use proper surgical techniques in order to insure that the surgery was done competently also sounds in medical malpractice. Again, this allegation focuses on the retention of staff privileges, an issue discussed in *Bronson*. Further, in *Bryant*, the Court addressed the plaintiff's **[*11]** claim that the defendant "negligently and recklessly failed to take steps to protect plaintiff's decedent when she was, in fact, discovered on March 1 [1997] entangled between the bed rails and the mattresses." *Bryant, supra at 430*. The Court determined that the claim sounded in ordinary negligence because "no expert testimony is necessary to determine whether defendant's employees should have taken *some* sort of corrective action to prevent future harm after learning of the hazard." *Id. at 430-431* (emphasis in original). This case is easily distinguished from *Bryant* because expert testimony is necessary to determine whether Hedeman utilized proper surgical techniques in performing the surgery. Such information is not within the common knowledge of a lay juror. Accordingly, plaintiffs' claim against defendant sounds in medical malpractice. [3]

[*12] III. Statute of Limitations and the Affidavit of Merit

Based on our determination that plaintiffs' claim against defendant sounds in medical malpractice, we must next ascertain whether plaintiffs were required to file an affidavit

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[3] Plaintiffs reliance on *Ferguson v Gonyaw*, 64 Mich. App. 685, 697; 236 N.W.2d 543 (1975), for the proposition that the claims against defendant are based on ordinary negligence rather than medical malpractice is misplaced. The *Ferguson* Court did not directly address the issue now before this Court (i.e., whether plaintiffs' claim sounds in ordinary negligence or medical malpractice), and did not utilize the appropriate standard set forth by our Supreme Court in *Bryant*.

of merit with respect to their claim against defendant and whether the claim was barred by the applicable statute of limitations. We hold that an affidavit of merit was required by the statute, and that the trial court erred in denying defendant's motion for summary disposition because plaintiffs' claim was barred by the applicable statute of limitations.

This Court reviews questions of law and issues of whether a claim is barred because of the statute of limitations de novo. *Bryant, supra at 419*; *Ligouri v Wyandotte Hosp & Med Ctr, 253 Mich. App. 372, 375; 655 N.W.2d 592 (2002)*.

Defendant argues that the trial court erred in denying its initial motion for summary disposition because plaintiffs filed their complaint without the required affidavit of merit, and that plaintiffs' claim against it should be dismissed because plaintiffs did not file the required affidavit until after the statute of limitations **[*13]** had expired. Plaintiffs argue that the trial court properly dismissed defendant's motion because their claim against defendant sounds in ordinary negligence, and expert testimony was unnecessary to support their claim.

Michigan courts have previously held that *MCL 600.2912d(1)* requires plaintiffs to file an affidavit of merit with their complaint. *MCL 600.2912d*; *Scarsella v Pollak, 461 Mich. 547, 548-549; 607 N.W.2d 711 (2000)*. The statute directs that a plaintiff or the plaintiff's attorney "*shall* file with the complaint *an* affidavit of merit . . . ." See *Id. at 549* (use of the word "shall" imposes a mandatory duty). It is thus clear from the statutory language that an affidavit of merit is required when filing a medical malpractice claim.

While the statute requires a plaintiff to file only one affidavit, a plaintiff may choose to file more than one when there are more than one medical professionals or facilities being sued. However, if the party determines that only one affidavit is necessary, the affidavit should address each of the distinct and separate claims of medical malpractice. **[*14]** The statute contains very specific instructions regarding the contents of an affidavit of merit, which is to include the standard of care, the health care provider's opinion that the standard of care has been breached by the health care professional or the health care facility, the appropriate actions the health care professional or facility should have taken to comply with the standard of care, and the manner in which the breach proximately caused the alleged injury. *MCL 600.2912d(1)*. Where a plaintiff's claims are separate and distinct, and each has a different standard of care, facts leading to the breach of that standard, and courses of proper actions that should have been taken, the affidavit of merit should contain that information in relation to each of the claims brought by the plaintiff.

In the instant case, plaintiffs' claims against defendant and Hedeman, while interrelated, are based on different standards of care, and different actions were alleged to support a

breach of those standards. However, because plaintiffs did not address the claim against defendant in the affidavit of merit filed along with their complaint, an additional affidavit **[*15]** of merit was necessary to support plaintiffs' claim against defendant. As stated in *Nippa v Botsford Gen Hosp (On Remand), 257 Mich. App. 387, 394; 668 N.W.2d 628 (2003)*, "the purpose of *MCL 600.2912d[1]* and *600.2169* is to ensure trustworthy medical expert testimony and to discourage frivolous lawsuits." Thus, the statutory requirements were not satisfied by filing the one affidavit in this case, where the affidavit contained no medical expert testimony against defendant as is required to pursue the medical malpractice claim against defendant. The fact that a plaintiff need only file one affidavit of merit does not mean that the affidavit does not need to contain the required information for each of the medical malpractice claims contained in a complaint, such as the one in the case at bar, which alleges a distinct but related claim of medical malpractice against both the physician and the institution. Accordingly, because the affidavit of merit filed with the complaint did not contain the statutorily required information regarding the claim against defendant, plaintiffs did not comply with the statutory requirement that an **[*16]** affidavit of merit be filed in a case alleging medical malpractice. [4]

Although, as indicated by the trial court, it may **[*17]** be difficult for plaintiffs to meet the requirements of *MCL 600.2169* with respect to medical malpractice claims brought against hospital administration, nothing in the statute exempts medical malpractice plaintiffs from the statutory requirement of filing an affidavit of merit along with the complaint in cases brought against an institutional defendant. In fact, *MCL 600.2912d* specifically includes the term "health facility" in addressing the information required to be contained in the affidavit of merit, thus indicating that an affidavit of merit must be filed in connection with medical malpractice claims brought against a health facility, such as defendant hospital.

We next turn to the issue of whether plaintiffs' claim against defendant was time-barred under the applicable statute of limitations. We find that it was.

In *Scarsella, supra*, our Supreme Court adopted the general rule that although the period of limitations is tolled when a complaint is filed, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence a medical malpractice lawsuit. *Id. at 549.* **[*18]** Thus, if a medical malpractice complaint is not accompanied by the required affidavit of merit, the statute of limitations is not tolled. *Id.*

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[4] Plaintiffs cite to *Nippa, supra*, for the proposition that they complied with the requirements of MCL 600.2912d because they timely filed with their complaint the affidavit of merit of a neurosurgeon, who specialized in the same medical specialty as Hedeman. See also, *Cox v Flint Bd of Hosp Managers*, 467 Mich. 1; 651 N.W.2d 356 (2002). However, *Nippa* did not address the precise issue before this Court. Here, plaintiffs brought claims against a hospital and a physician that were distinct. *Nippa* and *Cox* both relate to medical malpractice claims against a hospital under a theory of vicarious liability and not standard medical malpractice. Plaintiffs did not bring a claim of vicarious liability against defendant; accordingly, the reasoning of *Cox* and *Nippa* are inapplicable to the instant case.

at 549-550. In order for a medical malpractice plaintiff to toll the period of limitation, the plaintiff filing a complaint without an affidavit of merit must move for the twenty-eight-day extension provided for in MCL 600.2912d(2). Id. at 550. In cases where a medical malpractice plaintiff wholly omits to file the required affidavit of merit, the filing of the complaint is ineffective, and does not permit tolling of the applicable period of limitation, as permitting such a tolling would undo the Legislature's clear mandate that an affidavit of merit "shall" be filed with the complaint. Id. at 552-553.

In the instant case, the applicable two-year medical malpractice statute of limitations was set to expire on June 20, 1998. On June 16, 1998, plaintiffs filed their complaint against Hedeman and defendant. MCL 600.5805(6). On July 28, 1998, in response to plaintiffs' complaint, defendant filed its first motion for summary disposition based **[*19]** on plaintiffs' failure to file a proper affidavit of merit. [5] At oral argument, however, which was held on October 2, 1998, the trial court granted plaintiffs an additional twenty-eight days to file an affidavit of merit, apparently utilizing the "good cause" exception to the rule. On October 30, 1998, plaintiffs filed Nellis's affidavit. Upon filing their complaint, plaintiffs did not file an affidavit of merit with respect to the claim brought against defendant. Nor did plaintiffs at that time, or prior to the expiration of the statute of limitations, file a motion for good cause shown to extend the time by twenty-eight days. It was not until oral argument at the October 2, 1998, hearing that plaintiffs requested the trial court to permit them an additional twenty-eight days under the statute to file the affidavit of merit.

[*20] We find that the trial court erred in denying defendant's motion for summary disposition. Because an affidavit of merit did not accompany the complaint with respect to the claim against defendant, the complaint was insufficient to commence a medical malpractice action. Scarsella, supra at 550. A complaint filed without the proper affidavit of merit does not toll the statute of limitations. Scarsella, supra at 551-552. Thus, dismissal of plaintiffs' claim against defendant with prejudice was appropriate remedy where the statute of limitations ran on June 20, 1998, and plaintiffs failed to file an affidavit of merit with their complaint prior to the expiration of the statute of limitations. *Id.*

Further, plaintiffs' attempt to remedy their failure to file the affidavit of merit pursuant to MCL 600.2912d(2) was ineffective. In order to toll the statute of limitations under MCL 600.2912d(2), which provides an additional twenty-eight days to file an affidavit for good cause shown, the mere filing of a motion to extend the time for filing an affidavit of merit is insufficient to toll the **[*21]** statute of limitations. Rather, it is the

[5] Thus, and again contrary to the representations by plaintiffs' counsel during oral argument, the propriety of the trial court's decision on defendant's initial motion for summary disposition is at issue in this appeal.

granting of a motion for additional time under subsection 2912d(2) that tolls the period of limitation. *Barlett v North Ottawa Community Hosp, 244 Mich. App. 685, 691-692; 625 N.W.2d 470 (2001)*. Further, a motion to extend time only provides an additional twenty-eight days following the date the statute of limitations expires. See generally *Holmes v Michigan Capital Med Ctr, 242 Mich. App. 703, 705-706; 620 N.W.2d 319 (2000)*. Here, the statute of limitations ran before plaintiffs filed an effective complaint with respect to their claim against defendant, and before they even brought a motion to extend the time for filing the affidavit of merit. Naturally, plaintiffs' motion was not granted prior to the date the statute of limitations expired; therefore, plaintiffs' untimely motion to extend the time for filing the affidavit of merit was equally ineffective. That the trial court granted plaintiffs' motion to extend time for filing the affidavit is irrelevant because the granting of the motion after the statute of limitations expired did not revive plaintiffs' claim. Accordingly, plaintiffs' **[*22]** claim against defendant was time-barred, and the trial court erred in denying defendant's motion for summary disposition. [6]

Because the trial court erred in denying defendant's motion for summary disposition and plaintiffs' claim against defendant **[*23]** should have been dismissed, it is unnecessary for us to address plaintiffs' remaining issues. The issue raised in defendant's cross-appeal is dispositive of this case, and plaintiffs' claim against defendant should not have proceeded as far as it did.

Affirmed.

/s/ Stephen L. Borrello

/s/ Christopher M. Murray

/s/ Karen M. Fort Hood

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[6] In rendering our decision, we do not run into the situation contemplated by *Bryant* where the plaintiff labeled her claim as ordinary negligence rather than medical malpractice. Here, plaintiffs were aware of the potential problems associated with their claim, and attempted to avoid such problems by labeling their claim against defendant as "Negligence or Malpractice," and by attempting to file their claim within the two-year medical malpractice limitation period. Thus, our determination that plaintiffs' claim against defendant was time-barred was due to plaintiffs' failure to meet the medical malpractice statutory requirements in connection with the affidavit of merit, and not on plaintiffs' "understandable confusion" regarding the legal nature of their claim.

MONICA ESKEW, Personal Representative of the Estate of DAMONE LAMAR SANDERS v. PORNPICHIT

Court of Appeals of Michigan

June 29, 2001, Decided

No. *220554*

Reporter
2001 Mich. App. LEXIS 2192; 2001 WL 738399

Defendant, and VICTOR SORENSON, M.D., and HENRY FORD HEALTH SYSTEMS, [2] Defendants-Appellees/Cross-Appellants.

Notice: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Wayne Circuit Court. LC No. 98-836945-NH.

Disposition: Affirmed.

Core Terms

trial court, limitations period, affidavit of merit, twenty-eight-day, malpractice, summary disposition, plaintiff's claim, tolled, fail to file, ex-parte

Judges: Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

Opinion

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right, and defendants cross-appeal as of right, from the trial court's order granting summary disposition in favor of defendants pursuant to *MCR 2.116(C)(7)*, dismissing with prejudice plaintiff's claim. We affirm.

In a complaint filed November 13, 1998, plaintiff Monica ***Eskew***, personal representative of the estate of her son Damone Lamar Sanders, alleged that defendants negligently

[2] Throughout this opinion, defendants Sorenson and Henry Ford Health Systems will be referred to as "defendants."

treated plaintiff, while pregnant, during the time period in which she was involved in a motor vehicle accident. [3] Plaintiff further alleged that both she and Damone, born prematurely on May 25, 1993, suffered injuries as a result of defendants' negligence. According to the complaint, after being diagnosed with seizures, cerebral palsy and blindness, Damone died on May 18, 1994, of bronchopulmonary dysplasia and other complications.

[*2] The procedural history underlying the present appeal is somewhat complicated. Following Damone's death in May 1994, plaintiff was appointed personal representative of his estate on May 17, 1996. Plaintiff provided defendant with the requisite 182-day notice of her intention to pursue a medical malpractice claim on March 3, 1998. See *MCL 600.2912b(1)*. On November 13, 1998, plaintiff filed the instant action but failed to file an affidavit of merit with the complaint as required by *MCL 600.2912d(1)*. Instead, plaintiff included an ex-parte petition seeking an extension of time to file the required affidavit pursuant to *MCL 600.2912d(2)*. [4] **[*3]** For reasons unclear from the record, the trial court did not enter an order responding to plaintiff's petition until November 30, 1998. [5] Without explanation, the trial court's November 30, 1998, order granted plaintiff's request for an additional twenty-eight-days to file the affidavit.

Further complicating matters, on January 19, 1999, plaintiff filed a motion compelling the production of medical records pursuant to *MCR 2.314(D)* and seeking an additional extension of time to file the affidavit of merit pursuant to *MCL 600.2912d(3)*. The trial court denied plaintiff's motion **[*4]** on January 29, 1999, and defendants moved for summary disposition under *MCR 2.116(C)(7)*, arguing that plaintiff's claim was time-barred because plaintiff failed to file an affidavit of merit in a timely manner. Plaintiff filed the affidavit of Michael L. Berke, M.D., on December 28, 1998.

During the hearing on defendants' motion for summary disposition, the trial court concluded that plaintiff's claim was time-barred because she failed to file the affidavit of merit within the twenty-eight-day extension period. In reaching its conclusion, the

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[3] According to the complaint, plaintiff was injured in a motor vehicle accident on May 12, 1993, but had been treating with defendant Sethavaranguru since 1992. It appears from a review of the record that plaintiff was treated by defendants Sorenson and Henry Ford Hospital System following the accident in 1993.

[4] In the ex-parte motion, plaintiff indicated that in spite of the 182-day waiting period that commenced on March 3, 1998, she was unable to obtain the requisite medical records from Dr. Sethavaranguru. Plaintiff's ex-parte motion further stated: "without complete records, it is impossible for plaintiff's experts to completely and adequately review this case and fully and actually opine regarding issues of causation and damages."

[5] In her brief on appeal, plaintiff states that the trial court's order was delayed because it "took the matter under advisement." During a subsequent hearing on March 26, 1999, the trial court questioned plaintiff's attorney about the explanation for the delay between the filing of the exparte petition and the trial court's subsequent order. Specifically, the trial court stated on the record, "I don't know when [the ex-parte petition] was presented to me." A further review of the transcript reveals that the delay between the filing of the petition on November 13, 1998, and the granting of the order on November 30, 1998, may have been attributable to the court's concern that further information regarding the petition motion be supplied by plaintiff before the order was granted.

trial court drew from its prior ruling with respect to defendant Sethavaranguru's motion for summary disposition granted on February 19, 1999. [6] After making several calculations, the trial court found that the limitation period for plaintiff's claim expired on November 23, 1998. The trial court also concluded that the twenty-eight-day extension period expired on December 11, 1998. Because plaintiff did not file her affidavit of merit by that date, the trial court ruled her claim untimely. In rendering its decision, the trial court rejected plaintiff's argument that the twenty-eight-day extension period accrued on the date the court entered **[*5]** its order granting the extension. Instead, the court reasoned that the additional twenty-eight-day period ran from the date the complaint was filed on November 13, 1998.

[*6] We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998)*.

> In deciding a motion for summary disposition made under *MCR 2.116(C)(7)*, a court should consider all affidavits, pleadings, and other documentary evidence submitted by the parties. If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. [*Holmes v Michigan Capital Medical Center, 242 Mich App 703, 706; 620 NW2d 319 (2000)*.]

On appeal, plaintiff contends that the trial court erred in concluding that her claim was time-barred. According to plaintiff, the trial court's conclusion that the twenty-eight-day extension period began to run from the date of plaintiff's complaint was erroneous. In plaintiff's view, an interpretation of *MCL 600.2912d* compels the conclusion that the twenty-eight-day extension period begins to run from the date of the order granting plaintiff's request. We disagree.

MCL 600.2912d provides **[*7]** in pertinent part:

> (1) The plaintiff in an action alleging medical malpractice, or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file *with the complaint* an

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[6] Defendant Sethavaranguru filed for summary disposition on December 23, 1998. Summary disposition was granted with respect to him only on February 19, 1999. During the February 19, 1999 hearing the trial court made the following factual findings with respect to the running of the limitation period. Specifically, the trial court found that the two-year limitation period initially commenced on May 25, 1993, when Damone was born. See MCL 600.5805(5). However, the trial court also concluded that because Damone's death on May 18, 1994, occurred during the two-year limitation period, the savings provision of MCL 600.5852 operated to suspend the running of the limitation period until plaintiff was appointed to represent the interests of the estate. See e.g., *Lindsey v Harper Hospital*, 455 Mich 56, 60-61; 564 NW2d 861 (1997). Consequently, the court found that the limitation period began to run again on May 17, 1996, when plaintiff was authorized as the personal representative of Damone's estate. The trial court further found that the limitation period was tolled on March 3, 1998, for 182 days when plaintiff served defendants with her notice of intent to pursue a medical malpractice claim pursuant to MCL 600.2912b(1). The court further found that the limitation period was tolled for the eighty-three-day period between March 3, 1998 and May 17, 1998. As a result, the trial court concluded that plaintiff had until November 23, 1998, to file her medical malpractice suit. Plaintiff does not raise a challenge to the trial court's calculations with regard to the limitation period.

> affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169] . . . .
>
> * * *
>
> (2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff, of if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1). [(footnote omitted) (emphasis supplied).]

As this Court observed in VandenBerg v Vandenburg, 231 Mich App 497, 502; 586 NW2d 570 (1998), the Legislature drafted § 2912d in an attempt to deter frivolous medical malpractice suits. To achieve this purpose, the Legislature used the word "shall" in § 2912d to "indicate[] that an affidavit accompanying the complaint is mandatory and imperative." Scarsella v Pollak, 461 Mich 547, 549; 607 NW2d 711 (2000). **[*8]** Consequently, simply tendering a complaint without including the required affidavit will not function to commence a medical malpractice lawsuit. *Id.* Put another way, the mere filing of a complaint in a medical malpractice action without the affidavit of merit will not operate to toll the two-year limitation period. Id. at 552.

In the instant case, the parties do not dispute that plaintiff failed to file the required affidavit of merit with the complaint on November 13, 1998. Nor do the parties dispute that plaintiff properly attempted to utilize the remedial provision of § 2912d by requesting an additional twenty-eight days to file the affidavit of merit. At issue here is whether the twenty-eight-day extension period granted by the trial court commenced on the date plaintiff filed the complaint, or the date the trial court issued its order. This question presents an issue of statutory interpretation, which we review de novo. Wilhelm v Mustafa, 243 Mich App 478, 481; 624 NW2d 435 (2000).

Our first task in considering an issue of statutory construction is to examine the language of the statute. *Macomb Co Prosecuting Attorney v Murphy*, __ **[*9]** Mich __; __NW2d __(Docket No. 114444, dec'd 5/30/01) slip op p 10. "If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." The Herald Co v Bay City, 463 Mich 111, 118-119; 614 NW2d 873 (2000). When interpreting § 2912d, we must "consider both the plain meaning of the critical word or phrase [at issue] as well as its placement and purpose in the statutory scheme." Sun Valley Foods Co v Ward, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting Bailey v United States, 516 U.S. 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995) (internal quotation marks omitted). The Legislature's intent may be properly discerned by drawing reasonable inferences from the words in a statute. The Herald Co, supra at 117.

In our opinion, a plain reading of § 2912d demonstrates that the twenty-eight-day extension period afforded to a plaintiff "upon good cause shown" is additional time granted *from the time the complaint is filed*, not from the time the trial [***10**] court enters an order. Subsection (1) of § 2912d clearly specifies that "the plaintiff in an action alleging medical malpractice . . . shall file *with the complaint* an affidavit of merit . . . ." (emphasis supplied). In the event the plaintiff is unable to file the requisite affidavit of merit with the complaint, subsection (2) provides that "the court in which the complaint is filed may grant the plaintiff . . . *an additional 28 days* in which to file the affidavit required under subsection (1)." (emphasis supplied). In our view, the Legislature's use of the words "complaint" and "additional" in § 2912d lead to the reasonable inference that the twenty-eight-day extension period is additional time granted from the date of the filing of the complaint.

Similarly, we do not accept plaintiff's contention that the mere filing of a petition requesting the extension of time to file the affidavit of merit tolls the limitation period. In *Barlett v North Ottawa Community Hospital, 244 Mich App 685, 692; 625 NW2d 470 (2001)*, a panel of this Court rejected a similar argument. Specifically, the *Bartlett* Court opined that a review of § 2912d(2) and our [***11**] Supreme Court's decision in *Solowy v Oakwood Hospital, 454 Mich 214; 561 NW2d 843 (1997)* led to the conclusion that "the *granting* of a motion for additional time [by a trial court] tolls the period of limitation." (emphasis in original).

Moreover, the *Bartlett* Court rejected the plaintiff's claim that the limitation period was tolled until the court rendered a decision on the motion to extend time. In *Bartlett*, the Court's decision appeared to be motivated by its concern that the plaintiff failed to properly notice his motion for hearing. *Id. at 692-693*. We acknowledge that the facts in the instant case are not identical those in *Bartlett*. However, we find the *Bartlett* Court's reasoning to be of guidance in the present appeal. Were we to accept plaintiff's argument that the twenty-eight-day extension period commenced only on the trial court's entry of an order on the petition to extend time, such a decision would in effect allow the tolling of the limitation period during the time in which plaintiff awaited a decision from the trial court. This Court expressly sought to avoid such a result in *Barlett, supra. Id. at 692-693.* [***12**] Consequently, where plaintiff failed to file the affidavit of merit within the twenty-eight-day extension period granted by the trial court, and the two-year limitation period had expired, the trial court correctly dismissed plaintiff's claim with prejudice. *Holmes, supra at 706-707*.

In light of our conclusion that the trial court correctly dismissed plaintiff's claim with prejudice, we need not consider the additional issue raised by defendants on cross-appeal. [7]

Affirmed.

/s/ David H. Sawyer

/s/ Richard Allen Griffin

/s/ Peter D. O'Connell

[7] In the alternative, defendants argue that plaintiff did not demonstrate good cause for the granting of the twenty-eight-day extension. This issue is not properly before this Court because it was not decided by the trial court. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549-550; 599 NW2d 489 (1999).

BLACKMON

Court of Appeals of Michigan

February 21, 2003, Decided

No. ***234623***

Reporter
2003 Mich. App. LEXIS 484; 2003 WL 462589

JAMES ***BLACKMON*** and MAMIE ***BLACKMON***, Plaintiffs-Appellants/Cross-Appellees, GENESYS REGIONAL MEDICAL CENTER and DR. K. MEYER, D.O., Defendants-Appellees/Cross-Appellants, and DR. PAMELA MOORE-LUCAS, D.O., and DR. WILLIAM Y. CHILDS, D.O., Defendants.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Genesee Circuit Court. LC No. 00-067735-NH.

Disposition: Affirmed.

Core Terms

affidavit of merit, summary disposition, extension of time, expiration, statute of limitations, trial court, medical malpractice action, medical malpractice, twenty-eight-day, defendants', days, toll, limitations period, set forth, de novo, requirements, provides

Judges: Before: Markey, P.J., and Smolenski and Meter, JJ.

Opinion

PER CURIAM.

In this medical malpractice action, plaintiffs appeal by right the trial court's order granting summary disposition in favor of defendants pursuant to *MCR 2.116(C)(7)*. We affirm.

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendants. We disagree. Absent a factual dispute, the determination whether a claim is

barred by the expiration of the limitations period is a question of law that is reviewed de novo. *Young v Sellers*, ___ Mich. App. ___; ___ N.W.2d ___ (Docket No. 239829, issued 12/20/02), slip op p 2; *Hudick v Hastings Mutual Ins Co, 247 Mich. App. 602, 605-606; 637 N.W.2d 521 (2001)*. Further, a trial court's grant of summary disposition under *MCR 2.116(C)(7)* is reviewed de novo on appeal. *Novak v Nationwide Mutual Ins Co, 235 Mich. App. 675, 681; 599 N.W.2d 546 (1999)*. **[*2]**

In *MCL 600.2912d*, the Legislature set forth the requirements for commencing a medical malpractice claim. *MCL 600.2912d* provides, in relevant part:

(1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or . . . the plaintiff's attorney *shall file with the complaint an affidavit of merit* signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.

* * *

(2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

(3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in [*MCL 600.2912b(6)*], the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint. [Emphasis added.]

"The existing case law construing the statutory authority governing medical **[*3]** malpractice actions states that the failure to timely file a complaint *and* an affidavit of merit will not toll the applicable limitations period." *Young, supra*; see, also, *Scarsella v Pollak, 461 Mich. 547, 550; 607 N.W.2d 711 (2000)*. Although *MCL 600.2912d(2)* provides an additional twenty-eight days to file an affidavit of merit for good cause, the mere filing of a motion to extend the time for filing an affidavit of merit is insufficient to toll the statute of limitations. *Barlett v North Ottawa Community Hosp, 244 Mich. App. 685, 690-692; 625 N.W.2d 470 (2001)*. It is the granting of a motion to extend the time for filing an affidavit of merit that tolls the period of limitation in a medical malpractice action. *Id. at 692-693*.

In the present case, on the last possible day to file their medical malpractice complaint in this matter before the statute of limitations expired, plaintiffs filed a complaint along with an exparte petition seeking a twenty-eight-day extension of time under MCL 2912d(2) in which to file their affidavit of merit. However, the order granting plaintiff's

motion [*4] for a twenty-eight-day extension of time was not signed until the following day, one day after the statute of limitation had expired. Relying on *Barlett, supra*, the trial court granted defendants' motion for summary disposition after stating that the order granting an extension of time was not entered until after the expiration of the statute of limitations. We conclude on the basis of *Barlett* that the trial court properly granted defendants' motion for summary disposition because the court's actual grant of an extension of time did not occur until after the expiration of the statute of limitations.

To the extent that plaintiffs are now arguing for the first time that they had an automatic extension of time in which to file their affidavit of merit pursuant to *MCL 600.2912d(3)*, we will not address this argument. Plaintiffs failed to raise this issue below, and thus, the trial court did not decide it. The issue has not been preserved for appeal. *Fast Air, Inc v Knight, 235 Mich. App. 541, 549; 599 N.W.2d 489 (1999)*. In their petition and at the motion hearing, plaintiffs requested relief and a twenty-eight-day [*5] extension under *MCL 600.2912d(2)*. Plaintiffs sought no relief under *MCL 600.2912d(3)*.

In light of our previous conclusion, we need not address defendants' other arguments.

We affirm.

/s/ Jane E. Markey

/s/ Michael R. Smolenski

/s/ Patrick M. Meter